

THE **2021**
MILITARY
COMMANDER
AND THE LAW



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THE MILITARY COMMANDER AND THE LAW

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SOURCES OF COMMAND AUTHORITY

Article II, Section 2, of the United States Constitution provides the original source of command authority to the President as Commander-in-Chief. In Executive Order 12765, *Delegation of Certain Defense Related Authorities of the President to the Secretary of Defense*, the President delegated certain military authorities, including the authority to assign commanders, to the Secretary of Defense (SecDef).

Chain of Command

- The President and SecDef exercise authority, direction, and control of the Department of the Air Force through two distinct branches of the chain of command
 - Combatant commanders (CCDRs) exercise combatant command authority (COCOM) over missions and forces assigned to his or her command. For purposes of operational control (OPCON) of forces, the chain of command runs from the President, through SecDef, to the CCDR. For purposes other than OPCON, the chain of command runs from the President to SecDef to the Secretary of the Air Force (SecAF).
 - SecAF is responsible for administrative control (ADCON) of all Air Force members not assigned to CCDRs. This branch of the chain of command is separate and distinct from a combatant command and runs from the President to SecDef and from SecDef to SecAF, then to the major command commanders (MAJCOMs) and then on to subordinate commanders. SecAF generally exercises ADCON through the Chief of Staff of the Air Force (CSAF), who performs his/her duties under the authority, direction, and control of SecAF.

The Concept of Command by Uniformed Military Personnel

- The key elements of command are authority, accountability, and responsibility. Department of the Air Force commanders have the following four principal duties and responsibilities: execute the mission, lead people, manage resources, and improve the unit.
 - Commanders have threefold execution responsibilities: primary mission, Air Expeditionary Force readiness, and mission assurance of command and control
 - Leading people centers on the following five principles: communication, discipline, training, development, and quality of life engagement
 - Management of resources focuses on manpower, funds, equipment, facilities and environment, guidance, and airmen's time
 - Improving the unit is a continuous process involving strategic alignment, process operations, commander's inspection program, and data-driven decisions
- The authority to command devolves upon an *individual*, not a staff.
 - A commander is a commissioned officer who, by virtue of grade and assignment, exercises primary command authority over a Department of the Air Force unit (and some non-units, by exception)
 - A commander exercises control through subordinate commanders, principal assistants, and other officers to whom the commander has delegated authorities

- Staff officers are not commanders. Vice, deputy, on-scene, non-unit flight, and troop commanders, while acting solely in such capacity, are staff officers and have no command functions unless otherwise specifically delegated by superior competent authority. Staff officers assist the commander through advising, planning, researching, and investigating. Subordinate officers must issue all directives in the commander's name.
- Commanders may delegate administrative duties or authorities to members of their staff and subordinate commanders as needed. However, delegating duties does not relieve the commander of the responsibility to exercise command supervision.
- Commanders must be mindful of the following constraints:
 - Duties specifically imposed on commanders by federal law, such as the UCMJ, shall not be delegated to staff officers
 - Duties that have been designated non-delegable by a higher authority shall not be delegated
 - A commander should exercise sound judgment and discretion in delegating duties of clear importance

Command Authority over Active Duty Forces

- The commander's authority over active duty military members extends to conduct both on and off the installation
- Enlisted members take an oath upon enlistment to obey the lawful orders of the officers appointed over them
- Articles 89, 90, and 92 of the UCMJ prohibit disrespect towards, and mandate a duty to obey, superior officers

Command Authority over Reservists

- Commanders generally have administrative authority to hold reservists accountable for misconduct occurring on or off duty, irrespective of their military status when the misconduct occurred
- Commanders have UCMJ authority over reservists only for offenses committed when in military status

Command Authority over Air National Guard (ANG) Members

- ANG members ordered to active duty and placed on Title 10 status, as noted on the member's ANG Reserve Order Writing System (AROWS) orders, are assigned to the 201st Mission Support Squadron (201 MSS) for ADCON and attached to a Federal Operations/Training Mission for OPCON and Specified ADCON, with the exception of members assigned to the ANG Statutory Tour Program who may be ADCON to the Air National Guard Readiness Center (ANGRC) or another entity. The 201 MSS commander (201 MSS/CC) is dual hatted as the ANGRC vice wing commander (ANGRC/CV).
 - When ADCON is shared between the 201 MSS/CC and another Title 10 commander, coordination is required between the two commanders (or their designated representatives) on all disciplinary matters concerning ANG members
 - The 201 MSS/CC, or their designated representatives, will coordinate with the ANG member's Title 32 leadership to ensure they are aware and involved, as required, on all Title 10 disciplinary matters being handled by the 201 MSS

- Commanders with Specified ADCON of ANG Title 10 members are required to notify the 201 MSS as soon as practical once misconduct occurs or is discovered and to communicate any planned action regarding adverse administrative actions, nonjudicial punishment, court-martial, orders curtailment, and/or early re-deployment of the member
- Title 32 commanders who become aware of alleged Title 10 misconduct of their members are required to notify the 201 MSS team
- Normally, when on Title 32 or State Active Duty status, ANG forces are under the commands of their respective governors

Command Authority over Civilians

- The commander has certain authority over his/her civilian employees. Commanders and supervisors are delegated authority to take disciplinary and adverse actions against civilian employees when necessary. See Chapter 15, *Civilian Personnel and Federal Labor Law*, for more detail.
- The commander has less authority over nonemployee civilians on base
 - The installation commander has authority to maintain good order and discipline and to protect federal resources
 - Where available, the Federal magistrate court program provides a means of enforcing discipline on base for civilians who commit criminal misconduct. As a practical matter, authority over civilians who commit misconduct on base may be limited to referral to the magistrate program for prosecution, detainment for civilian law enforcement officials, revocation of driving privileges, and debarment from the installation. For more information on the magistrate program refer to Chapter 5, *Criminal and Military Justice*. See Chapter 6, *Personnel Issues – Generally*, for more information on driving privileges and debarment.
 - Except in very limited circumstances, commander has no authority over civilians off base

REFERENCES

U.S. Const. Art. II, § 2

Commanders of Combatant Commands: Assignment; Power and Duties 10 U.S.C § 164

Command: Commissioned Officers in Same Grade or Corresponding Grades on Duty at Same Place, 10 U.S.C § 749

UCMJ arts. 89, 90, 91, and 92

Executive Order 12765, *Delegation of Certain Defense Related Authorities of the President to the Secretary of Defense* (11 June 1991)

JP-1, *Doctrine of the Armed Forces of the United States* (23 March 2013), incorporating Change 1, 12 July 2017

AFI 1-2, *Commander's Responsibilities* (8 May 2014)

AFI 38-101, *Manpower and Organization* (29 August 2019)

AFI 51-509, *Appointment to and Assumption of Command* (14 January 2019)

AFI 36-704, *Discipline and Adverse Actions of Civilian Employees* (3 July 2018)

AFI 36-2907, *Adverse Administrative Actions* (22 May 2020), incorporating Change 1, 15 January 2021, certified current 15 January 2021

AFPD 51-5, *Administrative Law, Gifts, and Command Relationships* (31 August 2018)

COMMAND SUCCESSION

A commander is a commissioned officer who, by virtue of grade and assignment, exercises primary command authority over a Department of the Air Force unit as established by AFI 38-101, *Manpower and Organization*.

Eligibility to Command

- In order to command a unit, a commander must be: (1) a commissioned officer; (2) assigned or attached to the unit; (3) present for duty, and (4) otherwise eligible and authorized to command
 - An officer cannot command another officer of higher grade
- An officer is vested with command in one of two ways: either by assuming command or by appointment to command. To ensure clear lines and scope of authorities, appointment to command is preferred. An officer may be appointed to command another officer of the same grade but higher rank as provided in AFI 51-509, *Appointment To and Assumption of Command*.
- Succession of command may be permanent or temporary
 - A temporary assumption or appointment is used when the commander being replaced is only temporarily absent or disabled and expected to resume command. One example may be when a commander is on extended temporary duty orders and communications are extremely limited
 - Absence or disability for only short periods does not normally warrant an assumption of command by another officer
 - An officer can only assume command of an organization to which that officer is assigned by competent authority. However, officers attached to expeditionary or provisional units are eligible to command even if there is no documentation indicating that the officer has been attached for purposes of command.
- Officers cannot appoint themselves to command, and commanders cannot appoint their own successors, even for temporary absences
- There is no title or position of “acting commander.” As such, the term “acting commander” is not authorized.

Appointment to Command

- Appointment to command occurs by an act of the President, the Secretary of the Air Force (SecAF), or by his or her delegate(s). Unless otherwise restricted, all commanders subordinate to SecAF may appoint subordinate commanders within their command.
- An officer who is assigned to an organization, present for duty, and eligible to command may be appointed to command if they are at least equal in grade to all other eligible officers, without regard to rank within grade. No officer may command another officer of higher grade who is present for duty and otherwise eligible to command.

Assumption of Command

- Assumption of command is a unilateral act taken under authority of law, Secretarial direction, and regulation
 - Authority to assume command is inherent in that officer’s status as the senior officer in both grade (e.g. major, lieutenant colonel, colonel) and rank (seniority within a grade, earlier date of rank) so long as the officer is assigned to the unit, present for duty, and eligible to command

- No officer may assume command over another officer of higher grade or rank who is present for duty and otherwise eligible to command

Method for Assumption or Appointment to Command

- All command succession shall be announced and recorded on G-series orders, unless precluded by exigencies
- G-series orders are typically published on an AF Form 35, *Announcement of Appointment to Assumption of Command*, but they may be published in memorandum format

Resumption of Command after Temporary Absence

- There is no need to publish G-series orders when the original commander resumes command after a temporary absence, so long as they are still equal or senior in grade to any other officer then present for duty, assigned to the organization, and eligible to command
- If during the permanent commander's temporary absence, another officer senior in grade to him or her, who is eligible to command, is assigned or attached to the organization, then the returning commander may not resume command as long as the officer senior in grade remains assigned to the unit

Limitations on Eligibility to Command and Special Rules

- Enlisted members cannot exercise command
- A retired officer cannot exercise command unless recalled to active duty
- Civilians cannot exercise command of any Department of the Air Force unit or personnel in any duty status
 - Civilians may be appointed as directors to lead units and non-units. They may hold supervisory positions and provide work direction to military members and civilian personnel within their unit or defined sphere of supervision. Except as limited by law, a civilian leader of a unit is authorized to perform all functions normally requiring action by a unit commander of like position and authority. However, civilians cannot assume military command or exercise command over military members within the unit and, consequently, cannot use the term "commander" in any official manner or correspondence, or to describe their position.
 - Units designated to be led by civilian directors will not have commanders, and members of the unit or subordinate units may not assume command of the unit. Thus, a succession plan for leadership of the unit should be established in the event the civilian director is incapacitated.
 - In units with a civilian director, a competent command authority will establish procedures relating to functions that require a commander (e.g., imposition of nonjudicial punishment, initiation of administrative discharges, etc.). These functions will be accomplished either by attaching military members to a different unit led by a commander (for that limited purpose), or by elevating these functions to a command level above the unit.
 - Units subordinate to a civilian led unit may have a military commander
- Officers quartered on an installation, but assigned to another organization not charged with operating that installation, cannot assume command of the installation by virtue of seniority
- Officers assigned to Headquarters, Department of the Air Force (DAF), cannot assume command of personnel, unless competent authority specifically directs
- Chaplains cannot assume or be appointed to command, although they do have the authority to give lawful orders and exercise functions of operational supervision, control, and direction

- Students cannot command a Department of the Air Force school or similar organization
- Judge Advocates (JAGs) may only be appointed to or assume command if expressly authorized by The Judge Advocate General under emergency field conditions or as the senior ranking member among a group of prisoners of war
- An officer designated as a medical, dental, veterinary, medical service, or biomedical sciences officer or as a nurse cannot exercise command of units unless the primary mission involves health care or the health profession
- Command of Flying Units: Any unit that has flying, planning, and directing the employment of manned and remotely piloted aircraft as its primary mission is a flying unit. Only Line of the Air Force officers with a current aeronautical rating may command a flying unit. The rated officer must hold a currently effective aeronautical rating or crewmember certification, and must be qualified for aviation service in an airframe flown by the unit to be commanded.
 - Officers from other military departments with DAF-equivalent crew member ratings or certifications may command joint or consolidated flying training organizations. Refer to AFI 38-101 for further guidance on consolidated units.
 - Certain types of organizations, such as air base wings or groups, which have multiple missions that include responsibility for controlling or directing flying activities, are considered non-flying units and may be commanded by non-rated officers. In these cases, the subordinate flying unit commander is delegated the responsibility for the flying portion of the mission.
- O-9 and O-10 Commanders: Special rules exist for positions designated under 10 USC § 601 for the grade of lieutenant general or general. After the President nominates and the Senate confirms, the officer will be appointed to the command position. Actions associated with these appointments will be handled in accordance with paragraph 8.1 of AFI 51-509.
- Command of Active Duty Units by Reserve Officers: Only Air Reserve Component (ARC) officers on extended Title 10 active duty orders can command regular Department of the Air Force units. "Extended active duty" is defined as a period of 90 days or more during which the officer is on active duty (other than for training) orders.
 - The Commander, Air Force Forces (COMAFFOR) or his or her delegate may authorize reserve component officers not on extended active duty orders to command regular Air Force (RegAF) units operating under the COMAFFOR's authority. This authority may be delegated no lower than the commanders of Aerospace Expeditionary Wings for expeditionary units operating under the COMAFFOR's authority.
- Command of Reserve Units by Regular Officers: RegAF and ARC officers on Extended Active Duty may only command units of the Air Force Reserve (AFR) with HQ USAF/RE approval

Relief of Command

- A superior competent authority may relieve an officer of command for any reason not prohibited by law or policy. An officer may be temporarily suspended, relieved of command "not for cause," or relieved of command "for cause."
 - Suspension: A temporary suspension of an officer from command when a superior competent authority is concerned about the officer's ability to command but a final determination has not been made on whether relief of command is warranted and/or whether relief of command should be with or without cause. During the suspension period, the suspended officer is not eligible to command.

- Not for cause relief: An assignment action where the officer's relief of command may not be used as a basis for adverse action or collateral administrative documentation against the officer. An officer's duty performance or potential can be addressed on the officer's OPR.
- For cause relief: An action taken when a superior competent authority has lost confidence in the officer's ability to command due to misconduct, poor judgment, the subordinate's inability to complete assigned duties, the interest of good order and discipline, morale, the good of the organization, or other similar reasons. Relief for cause may be used as a basis to support adverse actions or collateral administrative documentation pertaining to the officer.

REFERENCES

Commanders of Combatant Commands: Assignment; Powers and Duties, 10 U.S.C. § 164

Positions of Importance and Responsibility: Generals and Lieutenant Generals, 10 U.S.C. § 601

Command: Retired Officers, 10 U.S.C. § 750

Command: Territorial Organization, 10 U.S.C. § 8074

Designation: Officers to Perform Certain Professional Functions, 10 U.S.C. § 8067

Command: Commissioned Officers in Certain Designated Categories, 10 U.S.C. § 8579

Command: Chaplains, 10 U.S.C. § 8581

AFMAN 11-402, *Aviation and Parachutist Service* (24 January 2019), including
AFMAN11-402_AFGM2021-01, 29 January 2021

AFI 38-101, *Manpower and Organization* (29 August 2019)

AFI 51-509, *Appointment to and Assumption of Command* (14 January 2019)

AF Form 35, *Announcement of Appointment to/ Assumption of Command* (14 January 2019)

FUNCTIONS OF THE STAFF JUDGE ADVOCATE (SJA)

The staff judge advocate (SJA) is the principal legal advisor to a commander and the senior legal advisor at all levels of command. SJAs and their respective staff provide the Department of the Air Force, commanders, and personnel with professional, full-spectrum legal support, at the speed of relevance, for mission success in joint and coalition operations. Legal office staffs can include judge advocates, civilian attorneys, paralegals, and civilian support staff.

Roles and Responsibilities

- Judge Advocate: A Department of the Air Force officer designated as such by The Judge Advocate General of the Air Force (TJAG) who
 - Is a graduate of a law school accredited by the American Bar Association at the time of graduation
 - Is a licensed attorney, active and in good standing, in at least one state or U.S. territory/commonwealth
- Staff Judge Advocate (SJA): On most Department of the Air Force installations, the senior judge advocate on extended active duty assigned to the installation commander's staff
 - Serves as the legal advisor to the wing commander
 - Supervises the members of the installation's legal office
 - The responsibilities of an Air National Guard (ANG) SJA may continue between drills. As such, ANG SJAs must be available to render legal advice to commanders, making teleworking an indispensable tool to achieve the mission.
- Deputy Staff Judge Advocate (DSJA): Military officer designated by TJAG as a judge advocate who is second to the SJA
- Assistant Staff Judge Advocates (ASJA): Other judge advocates assigned to the SJA's office. ASJAs provide the needed legal services essential for the proper functioning of the installation. In this capacity, they may perform duties such as chief of operations law, chief of military justice, chief of civil law, etc.
- Area Defense Counsel (ADC): A judge advocate performing defense counsel duties at an installation. The ADC is not affiliated with the installation's legal office and is not rated by the installation's SJA or installation commander. The ADC has an independent chain of command through AF/JA – Military Justice and Discipline, Trial Defense Division (JAJD).
- Special Victims' Counsel (SVC): A judge advocate providing legal assistance to and representing victims of sexual assault in administrative proceedings, interviews, non-judicial punishment, or courts-martial. The SVC is not affiliated with the installation's legal office or the ADC office and is not rated by the installation's SJA or installation commander. The SVC has an independent chain of command through AF/JA – Military Justice and Discipline, Special Victims' Counsel Division (JJS).

Legal Domains and Functional Organization of the Base Legal Office

- In 2018, to better align with the National Security Strategy (NSS), the National Defense Strategy (NDS), and senior leadership priorities, the Department of the Air Force's Judge Advocate General's Corps (JAG Corps) published the JAG Corps Flight Plan, aligning its efforts around three national security law domains: Military Justice and Discipline, Civil Law, and Operations and International Law. Leadership is at the core of all three.

- The JAG Corps' alignment ties each legal office into the strategic framework of national security law. These legal domains reflect how legal offices are organized with the major legal functions of the JAG Corps – advising commanders, advocating and litigating, representing individual airmen, and informing, engaging and partnering with stakeholders.
- The legal office provides a wide range of legal services to the wing commander and the installation. The following is a general overview of the JAG Corps' legal domains and the divisions within a typical legal office.
 - Military Justice and Discipline: To provide sound advice to commanders, administer fair, timely processes, and ensure justice for individuals to maintain the good order and discipline that further force readiness, efficiency, and effectiveness, and strengthen national security. Specifically, this division advises commanders on discipline, military justice matters, and adverse administrative actions including courts-martial, nonjudicial punishment under Article 15, UCMJ, and quality force management tools such as control rosters, unfavorable information files (UIFs), administrative demotions, letters of reprimand (LORs), letters of admonishment (LOAs), letters of counseling (LOCs), and records of individual counseling.
 - International and Operations Law: To engage legal capabilities to expand command decision options and enable projecting and employing ready forces to defense the Nation and our allies. Specifically, this division advises commanders on international and operational law issues such as foreign criminal jurisdiction, status of forces agreements (SOFAs), rules of engagement and targeting, and also provides law of armed conflict training and guidance.
 - Civil Law: To deliver advice, advocacy, and engagement across all civil law practice areas to assert and defend Department of the Air Force interests in the acquisition, operation, and protection of its people and assets. Specifically, this division advises commanders on civil law issues, including ethics, contract law, labor and employment law, environmental law, and medical law. Other general civil law responsibilities include issues such as private organizations, Freedom of Information Act (FOIA) and Privacy Act releases, personnel issues, fiscal law, commander-directed investigations (CDIs), line of duty determinations (LOD), and legal assistance.
 - *Legal Assistance and Preventive Law*: Legal assistance attorneys provide advice to service members and other eligible individuals on a range of legal issues including adoption, consumer law, divorce and child custody, income taxes, the Servicemembers Civil Relief Act (SCRA), and wills and estate matters. This division also provides free notary services.
 - Leadership: To develop leaders who provide the knowledge and talent management, training, planning, resourcing, and inspection capabilities necessary to maintain readiness. Most base legal office have three leadership positions. The SJA is the head of the office and is usually a Major, Lieutenant Colonel, or Colonel. The DSJA is typically one rank below the SJA and a Field Grade Officer. The Law Office Superintendent (LOS) is the senior enlisted paralegal assigned to a legal office. The LOS is typically an E-7, but can be an E-6 or an E-8.

REFERENCES

10 United States Code § 9037

AFI 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development* (29 November 2018)

PERSONAL LIABILITY OF COMMANDERS AND SUPERVISORS

Military personnel are generally immune from liability for decisions made and actions taken within the scope of their employment. However, they may be held personally liable, either civilly, criminally, or both, for actions deemed outside the scope of their employment (e.g., sexual harassment or commission of a federal crime), or those that clearly violate statutory or constitutional law.

Representation of Federal Employees in Civil Lawsuits

- Should you or one of your personnel be served with any summons or complaint, immediately contact your servicing staff judge advocate (SJA)
 - Representation by a Department of Justice attorney is available in almost all cases if the employee was acting “within the scope of employment” and if the action was not a violation of a federal criminal statute
 - Time is of the essence when requesting representation by a Department of Justice attorney and is equally important when responding to complaints or other court filings
- Private insurance, at one’s own expense, may be available to protect military commanders and supervisors against civil (not criminal) liability

Representation of Air National Guard Members in Civil Lawsuits

- Air National Guard (ANG) personnel on duty are usually covered by the Federal Tort Claims Act (FTCA) and exempt from personal liability for actions taken within the scope of their employment. However, they are not covered by FTCA while on state active duty orders in support of a state function.
 - ANG members served with any summons and complaint for actions taken within their scope of employment must immediately consult their SJA and forward the summons or complaint, through the appropriate channels, to the adjutant general, along with a request for representation and/or indemnification

REFERENCE

Department of Justice Policy, 28 C.F.R. Part 50.15-50.16

ARTICLE 138 COMPLAINTS

Article 138, Uniform Code of Military Justice (UCMJ), gives members of the Armed Forces who believe they have been wronged by their commanding officer the right to complain and seek redress. This right extends to regular Air Force (RegAF), Air National Guard (ANG) in Title 10 active duty status, and Air Force Reserve (AFR) while in federal service, whether on active duty orders, annual training, or inactive duty for training (IDT).

Scope of Article 138 Complaints

- Matters within the scope of Article 138, UCMJ, include discretionary acts or omissions by a commander that adversely affect the member personally and allegedly are:
 - A violation of law or regulation
 - Beyond the legitimate authority of that commander
 - Arbitrary, capricious, or an abuse of discretion
 - Clearly unfair or unjust (e.g., selective application of administrative standards/actions)
 - Unlawful pretrial confinement
 - Deferral of post-trial confinement
 - Administrative actions taken in lieu of court-martial or nonjudicial punishment under Article 15
- Matters beyond the scope of Article 138:
 - Acts or omissions not initiated, carried out, nor approved by the member's commander
 - Submissions seeking reversal or modification of non-discretionary command actions (e.g., mandatory Unfavorable Information File (UIF) actions)
 - A challenge to a respondent commander's action on an Article 138 complaint. However, a submission alleging the respondent commander failed to act on or forward a formal complaint will be considered a new informal Article 138 complaint against that respondent commander.
 - Submissions filed on behalf of another person. However, if the petitioner is represented by an attorney, the attorney may file on behalf of the petitioner.
 - Complaints requesting disciplinary action against another person
 - Submissions challenging actions taken pursuant to the recommendation of a board (e.g., administrative discharge board)
 - A submission relating to an involuntary administrative separation
- Matters in which the petitioner may seek redress through other forums which provide the petitioner notice, the opportunity to be heard, and review by an appellate or superior authority (or reviewing authority). Examples include:
 - Disciplinary action under the UCMJ, including nonjudicial punishment
 - Challenges to any evaluation report which affects a member's military career (e.g., Officer Performance Reports (OPRs), Enlisted Performance Reports (EPRs), Promotion Recommendation Forms (PRFs), etc.). These matters are addressed by the Evaluation Reports and Appeals Board (ERAB).
 - Challenges to any decoration approving authority's decision not to award a military decoration

- Relief from an assessment for pecuniary liability. Such complaints should be made to the Secretary of the Air Force Remissions Board (SAFRB).
- A suspension from flying status. Such submissions are addressed by a Flying Evaluation Board (FEB).

Article 138 Procedures

- Informal Complaint: To begin the Article 138 process, the Department of the Air Force member ("petitioner") must submit an informal complaint to the respondent commander
- Member Filing Deadline (Informal Complaint): The member must file the informal complaint to the respondent commander within 90 calendar days of discovering the alleged wrong. The commander may waive the time requirement for good cause.
- Form of the Informal Complaint: Informal complaints must be submitted in writing and the petitioner must state that the informal complaint is being submitted pursuant to Article 138. All submission must contain the following information:
 - The petitioner's current military unit and the petitioner's military unit at the time of the alleged wrong, if different
 - If the informal complaint is from a member of the Air National Guard (ANG) or Air Force Reserve (AFR), it must include information establishing that the alleged wrong was done in connection with service under Title 10 of the U.S. Code
 - The petitioner's current personal mailing address
 - The name and grade of the respondent commander
 - The name and contact information for any counsel representing the petitioner
 - A description of the facts and circumstances of the alleged wrong
 - A statement of the relief sought to correct the alleged wrong
 - All supporting evidence
 - The specific law or regulation the respondent commander violated, if applicable
- Proof Requirements: The member has the responsibility to establish a valid basis for the complaint. A valid basis for a complaint is one which alleges facts that, if true, would constitute a wrong within the scope of Article 138, UCMJ, and provides sufficient evidence to properly review the petitioner's allegation against the respondent commander. This responsibility is not a burden to prove that relief is warranted. It is the commander's duty to resolve whether relief is warranted.
- Staff Judge Advocate (SJA) Consultation: The respondent commander must consult his or her servicing staff judge advocate (SJA) before taking action on the member's informal complaint
- Evidence: The commander may consider available evidence in addition to matters attached to the initial complaint

Processing Informal Complaints

- Commander Initial Decision Deadline: No later than 30 days after receipt of the informal complaint or application for redress, the commander must notify the member in writing that:
 - A decision regarding the requested relief has been deferred to gather additional facts (such a notice shall be sent every 30 days until the fact gathering is complete);
 - The requested relief is granted;

- The requested relief is denied, in whole or in part, because the requested relief is not warranted; or,
- The informal complaint is dismissed because:
 - The submission is outside the scope of Article 138, UCMJ;
 - The submission is untimely;
 - The submission is deficient; or,
 - The submission fails to establish a valid basis for a complaint
- **Forwarding:** The respondent commander may forward the matter, to include all evidence obtained during the respondent commander's review, to his or her general court-martial convening authority (GCMCA). This action does not constitute the filing of a formal complaint.

Processing Formal Complaints

- If the respondent commander dismisses or denies (in whole or in part) the informal Article 138 complaint, the member may, within 30 days of receiving the respondent commander's written response, request GCMCA review
- If the petitioner does not receive a response from the respondent commander within 30 days of submitting an informal complaint, he or she may request GCMCA review within 60 days from the date the member submitted the informal complaint
- If the respondent commander defers the decision regarding the requested relief, the member may only request GCMCA review after 90 days from original submission of the informal complaint
- The formal complaint must be in writing and must specifically state that it is a formal complaint under Article 138, UCMJ. The member may submit the complaint directly to the GCMCA or through any superior commissioned officer.
- If the formal complaint is submitted to the immediate commander or a superior commissioned officer, that person has a duty to forward to the GCMCA

General Court-Martial Convening Authority's Responsibilities

- A GCMCA who receives an Article 138 complaint may rely on his or her staff for assistance with investigating and/or documenting findings. However, the GCMCA cannot delegate the authority to act on formal Article 138 complaints or to respond to petitioners.
- If a petitioner submits a formal Article 138 complaint to the GCMCA without first submitting an informal complaint to the respondent commander, the GCMCA should forward the complaints to the subordinate commander who allegedly committed the wrong. Any new allegations added by a member when seeking GCMCA review will be forwarded to subordinate commanders for initial review and appropriate action.
- The GCMCA must obtain a written legal review from the servicing SJA before responding to a petitioner's formal complaint. The SJA legal review is privileged attorney work product and not releasable to the petitioner or other individuals and should be marked accordingly.
- Not later than 60 days after receipt of the formal complaint, the GCMCA must notify the member that:
 - A decision regarding the requested relief has been deferred for the completion of a proceeding or additional inquiry (such a notice shall be sent every 30 days until the fact gathering is complete);
 - The requested relief is granted;

- The requested relief is denied, in whole or in part, because the requested relief is not warranted;
- The requested relief is warranted, but the authority to grant the relief requested resides with another GCMCA, major command (MAJCOM), or the Secretary of the Air Force (SecAF); or
- The complaint is dismissed because:
 - The submission is outside the scope of Article 138;
 - The submission is untimely;
 - The submission is deficient; or,
 - The submission fails to establish a valid basis for a complaint
- If the GCMCA believes the requested relief is warranted and the authority to grant the requested relief resides with another GCMCA, major command (MAJCOM), or the Secretary of the Air Force (SecAF), the GCMCA should forward the complaint and the recommendation to grant the requested relief to the appropriate authority for final action
- After taking final action and notifying the member, the GCMCA will send a complete copy of the file to AF/JA – Military Justice and Discipline’s Investigations, Inquiries, and Relief Division (JAJI), and will include the member’s personal mailing address

Secretary of the Air Force (SecAF) Review

- JAJI exercises SecAF authority for final review of formal Article 138 complaints
- JAJI provides the member with written notification of the completion of the review process and any further action taken on the complaint (and, if applicable, the reasons for that action)
- JAJI will provide the GCMCA and servicing SJA a copy of the final decision

REFERENCES

UCMJ art. 138

AFI 51-505, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice* (4 April 2019)

AFPD 51-5, *Administrative Law, Gifts, and Command Relationships* (31 August 2018)

COMMAND INFLUENCE AND UNLAWFUL COMMAND INFLUENCE (UCI)

Military commanders have a responsibility to maintain good order and discipline in the armed forces. In so doing, they must remain fair and impartial in their dealings while also safeguarding the constitutional due process rights of the accused. Statements made by and actions taken by commanders and their staff may result in a finding of unlawful command influence (UCI), often termed “the mortal enemy of military justice.” On 20 December 2019, through the Fiscal Year 2020 National Defense Authorization Act (§ 532), Congress overhauled Article 37 of the Uniform Code of Military Justice (UCMJ). Specifically, they (1) changed the title of the statute (now titled “Command Influence”), (2) codified case precedent on this area of the law, (3) included preliminary hearing officers as being protected from coercion, (4) expanded the types of communications excluded from the definition of UCI, and (5) placed a requirement of material prejudice to the substantial rights of the accused. While commanders are permitted to mentor their subordinates and address malignant behavior that is incompatible with military service and Department of the Air Force policy, they must avoid directing a particular disposition or substituting a subordinate’s discretion. The key is to understand what statements and actions constitute proper involvement by a commander, and what statements and actions cross the line into UCI.

Permissible Command Involvement in Military Justice

- Superior commanders are **NOT** prohibited from establishing and communicating policies necessary to maintain good order and discipline. They are also free to pass on their experience and advice regarding disciplinary matters without impacting the discretion of their subordinates in the matter. Examples of proper or lawful command involvement are:
 - Withholding a subordinate commander’s authority to act in an individual case or certain types of cases (offenses) and imposing punishment oneself
 - Obtaining information from a subordinate commander about ongoing cases, investigations, or incidents
 - Generally discussing with subordinate commanders or officers matters to consider when disposing of alleged violations
 - Consulting with subordinates regarding the disposition of an alleged offense at the subordinate’s request. However, the subordinate alone must decide what disposition decision or action, if any, to take in each case.
 - “Tough talk” policy letters, talks, and briefings on issues of concern (e.g., criminal activity or a particular criminal offense) are permissible so long as they do not show an overly determined attitude or attempt to influence the finding and sentence in a particular case
 - Focusing on problem areas is permissible (i.e.: characterizing illegal drug use as a threat to combat readiness). However, statements made should not advocate a particular disposition, a particular court-martial finding or sentence, and should not relate to a particular accused.

Unlawful Command Influence

- Generally:
 - *Convening authorities and commanders*: No court-martial convening authority, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel, with respect the finding or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding

- *All persons subject to the UCMJ*: No person subject to the Uniform Code of Military Justice (UCMJ) may attempt to coerce or, by any unauthorized means, attempt to influence the action of any convening, approving, reviewing authority or preliminary hearing officer, or a court-martial or court members in reaching the findings or sentence in any case
- Actual UCI: Someone subject to the UCMJ (typically someone acting with the “mantle of command authority”), either intentionally or unintentionally, manipulates the court-martial process to affect the disposition of a case or drive a certain result and materially prejudices the substantial rights of the accused
- Apparent UCI: Someone subject to the UCMJ (typically someone acting with the “mantle of command authority”), either intentionally or unintentionally, engages in conduct that would cause an objective observer, fully informed of all the facts and circumstances, to have significant doubt about the fairness of the proceeding and such action materially prejudices the substantial rights of the accused. The focus of apparent UCI is on the public perception of the military justice process.
- Superior commanders must not make comments that would imply that they expect a particular result in a given case or type of cases and commanders also cannot attempt to manipulate the court-martial process to drive certain results. The following actions are unacceptable:
 - Directing a subordinate commander to make a particular disposition decision or limiting the discretion of the subordinate convening authority
 - Discouraging or attempting to discourage a potential witness from participating in the investigatory process or testifying at a court-martial
 - Influencing or attempting to influence the action of a court-martial or court members to reach a particular finding or sentence
 - Directly or indirectly criticizing, disciplining, or expressing disapproval of any personnel participating in the court-martial process (e.g., military judge, trial and defense counsel, witnesses, court members, etc.)
 - Selecting members with the intent to achieve a particular result as to the findings or sentence (stacking the panel)
 - Commenting on the character of the accused or victim
 - Establishing an inflexible policy on disposition or punishment of offenses
 - Publicly commenting or opining on the Accused’s guilt prior to trial
 - Publicly criticizing court-martial punishments or judicial actions
- Each commander in the chain must remain free to exercise his or her own discretion to impose discipline without inappropriate interference from a superior commander
 - The key consideration is whether a commander is taking disciplinary action based upon that commander’s own personal belief that the disciplinary action is appropriate or whether the commander is merely acquiescing to direction from a superior to impose the particular discipline

REFERENCES

UCMJ art. 37

Command Influence, 10 U.S.C. § 837 (2019)

Rules for Courts-Martial 104 and 306 (2019)

AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_DAFGM2021-01, 5 January 2021

SERVING AS A COURT MEMBER

Military court members serve the same function in a military court-martial as jurors serve in civilian courts. For Airmen and Guardians serving as court-martial members, that service becomes the member's primary duty until the close of the trial.

Selection

- When convening a court-martial, the convening authority personally selects the court-martial panel members. In addition to the basic eligibility requirements set forth in Article 25 of the Uniform Code of Military Justice (UCMJ), the convening authority is directed to select as court members those who are ***“best qualified”*** for this duty. Factors used in court member selection include: ***age, education, training, experience, length of service, and judicial temperament.***
- Prior to sitting as a member in a court-martial, court members are usually asked to complete a court member data sheet detailing certain personal and professional information. This data sheet provides the attorneys for both sides information about a member's background, and assists them in determining whether there is reason to excuse that particular member from sitting on the court.
- Once detailed to sit on a court-martial, a member must avoid allowing others to speak about upcoming cases in their presence to maintain impartiality. This duty extends through the duration of the court-martial until the end of the proceedings.

Excusal of Detailed Members

- Excusal Prior to Trial: A convening authority may excuse or replace detailed members before the court-martial is assembled without showing cause. Detailed court members may also request to be excused before a court-martial is assembled, typically by showing good cause necessitating such excusal. Such requests should be made in writing and forwarded to the convening authority through his or her staff judge advocate (SJA).
- Excusal Requests During Trial: After the court-martial is assembled, the convening authority or military judge may only excuse court members for good cause shown on the record

Voir Dire

- The military judge is entitled to question court members to ensure impartiality. He or she may also permit trial counsel and defense counsel to conduct examination of members. This questioning or examination is referred to as “voir dire,” and occurs prior to the court members hearing any evidence in the case. Members may be questioned individually and collectively.
- After voir dire, trial and defense counsel may, outside the presence of the members, request the military judge excuse any court member whose answers may tend to cause a reasonable person to question the fairness of the proceedings. A member shall be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. The military judge rules on these “challenges for cause,” granting or denying them.
 - In addition to the grounds detailed in R.C.M. 912(f)(1), additional examples of grounds for challenge are that the member has a direct personal interest in the result of the trial, is closely related to the accused, a counsel, or a witness in the case, has participated as a member or counsel in the trial of a closely related case, has a decidedly friendly or hostile attitude toward a party, or has an inelastic opinion concerning an appropriate sentence for the offenses charge
- After “challenges for cause,” trial and defense counsel may each challenge one member peremptorily, meaning a non-cause reason

- If the military judge grants a challenge to a court-martial panel member, that member is released from the court-martial and may return to their normal duties
- Panel Requirements: After exercises of challenges, a capital case must be comprised of twelve voting members. A non-capital General Court-Martial must be comprised of eight voting members. However, if the number is reduced after impaneling, a non-capital General Court-Martial may proceed so long as at least six members remain to serve. A Special Court-Martial must be comprised of four voting members.

Duties at Trial – Findings

- The “findings” phase of the court-martial is where the accused’s guilt or innocence is decided
- The general order of events at a court-martial are questioning of court members (voir dire), challenges and excusals of court members, opening statements by trial and defense counsel, presentation of evidence, substantive instructions on the law, closing argument by trial and defense counsel, procedural instructions on voting, deliberations, and announcement of findings. If the accused is convicted of any offense, there will also be a sentencing proceeding.
- After trial and defense counsel have questioned witnesses, court members are permitted to ask witnesses any substantial questions that they have (at the close of the witness’ testimony or prior to any witness being permanently excused). All questions will be reviewed by counsel for both sides and the military judge before it is asked of the witness and all questions are subject to objection.
- Under the law, the accused is presumed to be innocent of the offense(s) and the government has the burden of proving his or her guilt by legal and competent evidence beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves one firmly convinced of the accused’s guilt. If a member thinks there is a real possibility that the accused is not guilty, the member must give the accused the benefit of the doubt and find him or her not guilty.
- Deliberations should include a full and free discussion of all the evidence presented during the trial. After discussion, the findings must be accomplished by secret, written ballot and all court members are required to vote. Each member has an equal voice in discussing and deciding a case and the influence of superior in rank cannot be employed to control any member’s exercise of their own personal judgment.

Duties at Trial – Sentencing

- If the accused is convicted of any offense, the court must determine the appropriate sentence (kind and amount of punishment)
- During the sentencing phase of the trial, the government may present evidence in aggravation, or the circumstances surrounding the commission of the offense that would tend to increase punishment. The accused may present evidence in extenuation or mitigation of the offenses of which he or she was found guilty, or evidence the accused wants the court to consider in deciding an appropriate sentence. In doing so, the accused may present the testimony of witnesses, offer documentary evidence, testify under oath, or make an unsworn statement.
- Following presentation of evidence at the sentencing phase of the court martial, court members will deliberate and vote on the appropriate sentence in the case. It is the duty of each member to vote for a proper sentence (the kind and amount of punishment) for the offense(s) of which the accused has been found guilty.

Special Considerations for Air National Guard Members

- Depending on the duty status of the Air National Guard (ANG) member in question, the ANG may convene trials and board hearings under their respective state military code. As such, the applicable standards and burdens may differ from federal requirements.

REFERENCES

UCMJ art. 25

Rules for Courts-Martial 501-506, 912

Department of the Army Pamphlet 27-9, *Military Judges Benchbook* (1 February 2021)

AFI 51-201, Administration of Military Justice (18 January 2019), including DAFI51-201_DAFGM2021-01, 5 January 2021

TESTIFYING AS A WITNESS

You or one of your subordinates may be called to testify at a court-martial or other administrative hearing. Under the Uniform Code of Military Justice (UCMJ), both the prosecution and defense are entitled to equal access to all witnesses and evidence. No Airman or Guardian should attempt to influence the testimony of a court-martial witness to include deterring or attempting to deter a potential witness from testifying.

- The witness' role is to provide truthful testimony and not to advocate for one side or the other. The witness should not attempt to hide information from one side or the other.
- Both the trial counsel and defense counsel may call witnesses during the findings portion of the trial to provide evidence. During this phase of the court-martial, it is the duty of the military judge and/or court members to determine whether the accused is guilty or not guilty of the charged offense(s).
- Trial and defense counsel may also call witnesses during the sentencing portion of the trial. At the conclusion of this phase of the court-martial, the military judge and/or court members will have the duty to vote for a proper sentence (kind and amount of punishment) for the offense(s) of which the accused was found guilty.
 - Witness called to testify during sentencing proceedings may offer limited evidence (testimony) of the accused's character, the nature and circumstances surrounding the offense(s), the impact of the offense(s) on the well-being of the victim or the mission, discipline, or efficiency of the command, and the rehabilitative potential of the accused
 - Witnesses are not allowed to offer a recommendation or opinion as to a specific sentence he or she believes should be adjudged in a case. This decision is reserved solely to the military judge and/or court members.
 - When testifying about the accused's rehabilitative potential, the witness must have sufficient information (basis) and knowledge of the accused to offer a rationally based opinion and such opinion must be based on information known by the witness and/or the witness' knowledge of the accused's personal circumstances. Rehabilitative potential refers to the accused's potential to be restored to a useful and constructive place in society.
 - To test the basis of a witness' opinion regarding the accused's rehabilitative potential, counsel may ask a testifying witness whether he or she knew, had heard, or was aware of certain actions of the accused. This form of question is permissible and witnesses should answer such questions truthfully.
- Prior to a witness' in-court testimony, the attorney calling the witness should discuss the questions he or she will likely ask, as well as the types of questions the opposing counsel will likely ask the witness on cross-examination
- The opposing counsel should also have the opportunity to interview potential witnesses prior to his or her in-court testimony. It is very common for both sides to interview a witness.
- Immediately report any attempts to influence your testimony to the staff judge advocate (SJA)

REFERENCES

UCMJ art. 46

Rules for Courts-Martial, 701, 703, and 1001 (2019)

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CHAPTER TWO: QUALITY FORCE MANAGEMENT

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ADVERSE ADMINISTRATIVE ACTIONS – COUNSELING, ADMONISHMENT, AND REPRIMAND

Counseling, admonishments, and reprimands are quality force management tools available to supervisors, superiors, and commanders. These management tools are designed to improve, correct, and instruct those who depart from expected standards of performance, conduct, bearing, and integrity, on or off duty, and whose actions degrade the individual or the unit's mission. These tools are intended to correct rather than punish behavior. When properly used, they help maintain established Department of the Air Force standards and enhance mission accomplishment.

What Action is Appropriate

- The Basics: AFI 36-2907, *Adverse Administrative Actions, Chapter 2*, contains guidance on administrative letters of counseling, admonishments, and reprimands. The counseling is the lowest level of administrative action. An admonishment is more severe than a counseling. A reprimand is more severe than an admonishment and carries a stronger degree of official censure.
- Primary Considerations: The decision to formally counsel, admonish, or reprimand should be based primarily on two factors:
 - Nature of the incident: The seriousness of the member's departure from Department of the Air Force standards should be considered before deciding what type of action to take. Counseling, admonishments, and reprimands may be administered for **ANY** departure from Department of the Air Force standards. Unlike nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), they are **NOT** limited to offenses punishable by the UCMJ.
 - Previous disciplinary record of the member: Counseling, admonishments, and reprimands should be used as part of a graduated pattern of discipline in response to repeated departures from standards
- Who May Issue: Commanders, first sergeants, supervisors, and other persons in authority
- Form of the Action: May be verbal, written, or both. However, actions should usually be in writing to document the deviation as well as reinforce the importance of correcting the behavior. A verbal counseling may be recorded on an AF Form 174, *Record of Individual Counseling* (RIC).
- Letters of counseling (LOCs), letters of admonishment (LOAs), and letters of reprimand (LORs) must comply with AFI 36-2907
 - A sample format for an LOC, LOA, or LOR along with its indorsements follows this section as an attachment
 - **Failure to follow the requirements for drafting and maintaining** these documents could limit the use of the documents in a subsequent proceeding such as a court-martial or administrative discharge proceeding

Procedures

- Standard of Proof: The standard of proof for adverse administrative actions is the "preponderance of the evidence." A preponderance of the evidence exists when it is more likely than not that the allegations occurred as alleged. This standard will be used when evaluating the evidence and every element of the alleged offenses.

- Administering Adverse Action:

- A written LOC, LOA, or LOR must state the following:
 - What the member did or failed to do, citing specific incidents and their dates. Since an LOC, LOA, or LOR is not limited to offenses punishable by the UCMJ, it is not always possible to cite specific violations of the UCMJ. However, if the member has violated a UCMJ article, that violation should normally be included in the language of the letter.
 - What improvement is expected of the member
 - That further deviation may result in more severe action
 - That the member has three duty days to acknowledge the intended actions and provide pertinent information before the issuing authority makes the final decision on the administrative action. Reservists not on active duty status have 45 days to provide a response.
 - That the member's written response will become part of the record
- LOCs, LOAs and LORs will include and list as attachments all documents that serve, in part or in whole, as the basis for the action. Supporting documents include, but are not limited to, relevant statements, portions of investigations, and reports.
- Time to Respond: Provide the member with three full duty days (45 days for Reservists not on active duty orders). During this time, the member may wish to consult with an Area Defense Counsel (ADC). The member may respond prior to the expiration of the time to respond; however, the issuer of the letter should not pressure the member into responding prior to expiration of the allowed time.
- Final Disposition of Action: Whether or not the member submits a response, the issuer of the LOC, LOA, or LOR should inform the member within three duty days of their decision as to the final disposition of the action
 - If using an indorsement similar to that in the attachment, the issuer of the letter should fill in the date of the indorsement, strike through the inapplicable language in parentheses, and sign the indorsement
 - Issuer may withdraw the action or leave the action as written. Withdrawing the action does not bar the issuer from taking alternate appropriate action (e.g., withdrawing an LOR and initiating an LOA).
 - Ensure the recipient acknowledges the final disposition of the action. Once the recipient acknowledges receipt of the final disposition, the record becomes a finalized record. Annotate on the administrative action if the member fails to acknowledge receipt or provide a response.
- Contents of Record: The record of the action consists of the finalized RIC, LOC, LOA or LOR and written response submitted by the member and/or the member's defense counsel. Additional materials submitted by the member in mitigation, extenuation, or defense are not part of the record. Evidence and any other written materials considered as a basis for imposing the administrative letter are not part of the record.
- Inform Leadership: Issuer should inform the member's chain of command of the action. Send the letter with all indorsements, and any documents submitted by the member to the member's superiors or commander for information, action, or approval for entry in the member's Personnel Information File (PIF), Unfavorable Information File (UIF), or both.

- **Privacy Act Requirements:** Written counseling, admonishments, and reprimands are subject to the rules of access, protection, and disclosure outlined in AFI 33-332, *Air Force Privacy and Civil Liberties Program*. Therefore, all LOCs, LOAs, and LORs must contain a paragraph outlining the applicability of the Privacy Act to the document. Copies held by supervisors, commanders, and those filed in a member's UIF or PIF are subject to the same Privacy Act rules.

Adverse Administrative Actions and Unfavorable Information Files (UIFs)

- LOCs, LOAs, and LORs may be placed in a UIF
- Commanders who wish to establish a UIF on optional letters (LOCs, LOAs, and LORs for enlisted members and LOCs and LOAs for officers) must notify the member using an AF Form 1058, *Unfavorable Information File Actions*, before establishing a UIF. LORs issued to officers must be filed in a UIF via AF Form 1058, but the commander does not need to submit the AF Form 1058 to the officer because the officer is provided with an opportunity to rebut the LOR when it is initially presented.
- The disposition rules are as follow:
 - For enlisted Airmen, placing the LOC, LOA, or LOR into a UIF is discretionary with the UIF establishing authority. The LOC, LOA, or LOR, if placed in a UIF, remains for one year from the date the commander signs section V of the AF Form 1058.
 - For officers, placing an LOC or LOA in a UIF is discretionary. However, if an officer receives in LOR, the UIF is mandatory. It remains for two years from the date the commander signs section V of AF Form 1058. See AFI 36-2907, Table 3.2.

Adverse Administrative Actions for Reserve and Air National Guard (ANG) Members

- Commanders, supervisors, and other persons in authority can issue administrative counseling, admonishments, and reprimands to members of the Air Force Reserve and Air National Guard (ANG) who commit an offense while in civilian (non-Title 10) status. Additionally, AFI 36-2907 applies to ANG personnel on Title 32 status except when otherwise directed by the state.
- When issuing an LOC, LOA, or LOR to a Reserve or ANG member, follow the procedures discussed above. However, the following exceptions apply:
 - If the member has departed the duty area, the commander may send the LOC, LOA, or LOR and supporting documents via certified mail to the member's address or best available address, and the member will be presumed to be in receipt of this official correspondence
 - Non-Extended Active Duty (Non-EAD) Reservists and ANG personnel have 45 calendar days from the date of receipt of the certified letter to acknowledge the notification, intended actions, and provide pertinent information before the commander makes a final decision. In calculating the time to respond, the date of receipt is not counted. If the member mails the acknowledgment, the date of the postmark on the envelope will serve as the date of acknowledgment.
 - The issuer of the LOC, LOA, or LOR has 45 calendar days from the receipt of the certified letter or personal delivery of the member's response to advise the member of his or her final decision regarding any comments submitted by the member

Reporting Demographic Information on Adverse Administrative Actions

- Upon receipt of the finalized record, the issuer's immediate commander will:
 - Review the rank, age, gender, race, and ethnicity of both the issuer and the recipient as it is listed in their official Department of the Air Force record; and
 - Provide the finalized record and substantiating documentation on completed actions to their servicing Staff Judge Advocate (SJA) within five duty days (45 calendar days for members of the Air Force Reserve, and in accordance with AFI 36-2907, paragraph 5.1.2 for the ANG). Within this timeframe, the issuer's immediate commander will likewise report to his or her SJA, using the AF/JA demographic tracker contained in AFI 36-2907, Table 5.1., the following information:
 - Type of administrative action issued, final administrative action, underlying offense(s), rank, age, gender, race, and ethnicity of issuer; and
 - Type of administrative action issued, number of prior administrative actions received, underlying offense(s), final administrative action, rank, age, gender, race, and ethnicity of recipient

Officer Adverse Information and Promotion Boards

- All LOAs and LORs, as well as LOCs related to a substantiated finding or conclusion from an officially documented investigation or inquiry, issued to officers will be filed in the Officer Selection Record (OSR) in accordance with AFI 36-2608, *Military Personnel Records System*
- FY20 National Defense Authorization Act (NDAA) amended 10 U.S.C. § 615(a)(3) to require all services to furnish adverse information to selection boards considering regular officers for promotion to the grades of O-4 and above, and reserve officers to O-6 and above. Adverse actions, for purposes of this rule, includes:
 - Any substantiated adverse findings or conclusions from an officially documented investigation or inquiry, regardless of whether command action was taken as a result
 - Approved court-martial findings of guilt (court-martial orders)
 - Nonjudicial punishment (NJP) pursuant to Article 15, UCMJ
 - LORs
 - LOAs
 - LOCs related to a substantiated adverse finding or conclusion from an officially documented investigation or inquiry
 - Notices of relief of command (for cause)
- There is a new requirement that all officer adverse information be placed in the OSR and remain there subject to the Department of the Air Force records retention requirements
- The Department of the Air Force Policy Memorandum (DAFPM) on Adverse Information for Total Force Officer Selection Boards and DoDI 1320.14, *DoD Commissioned Officer Promotion Program Procedures*, establish specific policy and provide guidance associated with furnishing adverse information to officer promotion selection, special selection, federal recognition (ANG specific), and selective continuation boards

REFERENCES

Information Furnished to Selection Boards, 10 U.S.C. § 615(a)(3)

DoDI 1320.14, *DoD Commissioned Officer Promotion Program Procedures* (16 December 2020)

National Defense Authorization Act (NDAA) for Fiscal Year 2020, Pub Law 116-92 (2019)

Department of the Air Force Policy Memorandum (DAFPM) on Adverse Information for Total Force Officer Selection Boards (14 January 2021), published 26 February 2021

AFI 33-332, *Air Force Privacy and Civil Liberties Program* (9 March 2020)

AFI 36-2608, *Military Personnel Records System* (26 October 2015)

AFI 36-2907, *Adverse Administrative Actions* (22 May 2020), incorporating Change 1, 15 January 2021

AF Form 174, *Record of Individual Counseling* (20 May 2019)

AF Form 1058, *Unfavorable Information File Action* (23 December 2020)

ATTACHMENT

Sample Letter of Counseling/Admonishment/Reprimand

Suggested Format for LOC, LOA, and LOR

Date

MEMORANDUM FOR [RANK FIRST M. LAST]

FROM: Organization/Office Symbol [Issuer's organization and office symbol]

SUBJECT: Letter of [Counseling/Admonition/Reprimand]

1. Investigation has disclosed [the basis for the action, including what the member did or failed to do, citing specific incident(s) and their date(s)].

2. You are hereby [counseled/admonished/reprimanded]! [Discuss the impact of what the member did or failed to do]. [What improvement is expected]. Your conduct is unacceptable and further deviation may result in more severe action.

3. The following information required by the Privacy Act is provided for your information.

AUTHORITY: 10 U.S.C. § 9013. PURPOSE: To obtain any comments or documents you desire to submit (on a voluntary basis) for consideration concerning this action. ROUTINE USES: Provides you an opportunity to submit comments or documents for consideration. If provided, the response you submit becomes a part of the record. DISCLOSURE: Your written acknowledgment of receipt and signature are mandatory. Any other comments or documents you provide are voluntary.

4. [For Regular Air Force, Active Guard and Reserve, Air Reserve Component Statutory Tour members, or Air National Guard members in Title 10 status (officer and enlisted)]: You will acknowledge receipt of this Letter of [Counseling/Admonishment/Reprimand] immediately by signing the first indorsement. Within 3 duty days from the day you received this letter, you will provide your response by signing the second indorsement below. Any comments or documents you wish to be considered concerning this letter must be submitted at that time, and will become part of the record, consistent with AFI 36-2907, *Adverse Administrative Actions*, paragraph 2.4.2.5. After receiving your response, I intend to notify you of my final disposition of this action within 3 duty days.

5. [For Air Reserve Component members not in a duty status]: You will acknowledge receipt of this Letter of [Counseling/Admonishment/Reprimand] immediately by signing the first indorsement. Within 45 calendar days from the day you received this letter, you will provide your response by signing the second indorsement below. Any comments or documents you wish to be considered concerning this letter must be submitted at that time, and will become part of the record, consistent with AFI 36-2907, *Adverse Administrative Actions*, paragraph 2.4.2.5. After receiving your response, you will be notified of my final decision regarding any comments submitted by you within 45 calendar days.

6. [For officer Letters of Reprimand]: If this Letter of Reprimand is sustained, it will be placed in an Unfavorable Information File (UIF). Submit any comments or documents you wish to be considered concerning the UIF when you respond to the Letter of Reprimand.

Signature

Issuing Authority's Duty Title, Organization

[Attachment(s):
Enumerated documents as appropriate]

1st Ind to Organization/Office Symbol [of issuer], date, Letter of [Counseling/Admonishment/
Reprimand]

Recipient's Rank First M. Last

Date

MEMORANDUM FOR Organization/Office Symbol [Issuer's organization and office symbol]

I acknowledge receipt and understanding of this letter on _____ at _____
hours. I understand that I have [3 duty days][45 calendar days] from the date I received this letter
to provide a response and that I must include in my response any comments or documents I wish
to be considered concerning this Letter of [Counseling/Admonishment/Reprimand].

Signature

Letter Recipient

2nd Ind, Recipient's Rank First M. Last

Date

MEMORANDUM FOR Organization/Office Symbol [Issuer's organization and office symbol]

I have reviewed the allegations contained in this Letter of [Counseling/Admonishment/
Reprimand]. (I am submitting the attached documents in response) (I hereby waive my right to
respond).

Signature

Letter Recipient

3d Ind, Organization/Office Symbol [Issuer's organization and office symbol]

Date

MEMORANDUM FOR RECIPIENT RANK FIRST M. LAST

(I have considered the response you submitted on _____.) (You waived your right to submit a response to this action). I have decided to [withdraw the Letter of [Counseling/Admonishment/Reprimand] [sustain the Letter of Counseling/Admonishment/Reprimand] [reduce the action to a Letter of Admonishment/Counseling]. [For officers only: This Letter of Reprimand will be placed into an UIF.]

Signature

Issuing Authority's Duty Title, Organization

4th Ind to Organization/Office Symbol [of issuer], date, Letter of [Counseling/Admonishment/Reprimand]

Recipient's Rank First M. Last

Date

MEMORANDUM FOR Organization/Office Symbol [Issuer's organization and office symbol]

I acknowledge receipt of the final decision regarding disposition of this Letter of [Counseling/Admonishment/Reprimand] on _____ at _____ hours.

Signature

Letter Recipient

Note: The 1st Indorsement (Ind) is dated the same day the member receives the letter; the 2d Ind is dated within 3 duty days (or 45 calendar days for Air Reserve Component members not in a duty status); the 3d Ind should be dated within 3 duty days (or 45 calendar days) of the 2d Ind. When the first indorsement occurs on any page other than the letterhead page, it must include the citation line for the letter. In this example, the 1st Ind is the first indorsement to occur on a new page. The citation line for the indorsement memorandum consists of the indorsement number followed by the Organization/Office Symbol, SUBJECT, and date of the original memorandum. The citation line ends with the indorsement date: for administrative actions this should be the same as the Letter of Reprimand date.

UNFAVORABLE INFORMATION FILE (UIF)

The unfavorable information file (UIF) provides commanders with an official and single means of filing derogatory data concerning a Department of the Air Force member's personal conduct and duty performance. With some exceptions, the commander has discretion as to what should be placed in a UIF and what should be removed.

About the UIF

- The UIF is an official record of unfavorable information about an individual. It documents administrative, non-judicial, or judicial censures of the member's performance, responsibility, and behavior.
- The UIF is maintained by the base UIF monitor appointed by the Force Support Squadron superintendent/director

Establishing a UIF

- Authority to Establish UIFs: Must be established by a commander or equivalent civilian directors at all levels. Commanders must be on G-series orders and senior to the member.
- Contents of UIF: A UIF may only be established when some form of derogatory data is entered into it. In other words, a UIF must be populated with a record of unfavorable information or it ceases to exist. Common UIF documents include letters of reprimand (LORs), admonishment (LOAs), and counseling (LOCs), records of nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), control roster actions, documented instances of discrimination or sexual harassment, civilian convictions, and records of courts-martial.
- Documenting UIF: The UIF is generally established through the use of an AF Form 1058, *Unfavorable Information File Actions*. This form notifies military members of the commander's intent to establish a UIF and provides the member with three duty days to respond. Non-extended active duty (EAD) Reservists and Air National Guard (ANG) members will have 45 days from the receipt of the UIF action to provide a response.
- Mandatory UIF Filings:
 - Certain unfavorable information requires mandatory filing into a UIF. Examples of actions requiring mandatory filing include conviction by a court martial, NJPs received by officers, control roster actions, and LORs received by officers.
 - Table 3.2 of AFI 36-2907, *Adverse Administrative Actions*, outlines whether the UIF establishing authority is required to file certain documents in the member's UIF or whether filing the documents in the UIF is optional
 - Actions that require mandatory reporting do not require the use of an AF Form 1058
- Discretionary UIF Filings: Records of unfavorable information that do not require mandatory filing are included in a UIF at the discretion of the commander

Retention and Disposition

- Standard UIF Retention Time: The retention time depends on the nature of the document and the rank of the member. Removal of the document from the UIF is automatic at the end of the retention period. Table 3.2 of AFI 36-2907 outlines the disposition date for various contents of a member's UIF.

- Early Removal of UIF Filings: Commanders may remove documents from the UIF early by initiating action via AF Form 1058, or via memorandum, and notifying the member
 - Early removal of derogatory data is **NOT AUTHORIZED** if the member is still serving punishment. Specifically, commanders are prohibited from removing any documents in a member's UIF or adjusting disposition dates for NJPs or courts-martial before punishment, sentence, judgment, or action is complete.

Access and Review

- Access: Only commanders and the following individuals may view UIFs:
 - Member who has the UIF
 - First Sergeants reviewing UIFs on enlisted member assigned or attached to their units
 - Rating officials, when preparing to write or endorse a performance report, make a promotion recommendation, or recommend reenlistment
 - Senior Department of the Air Force officer or commander of a Department of the Air Force element in a joint command
 - Department of the Air Force element section commander in a joint command
 - Military Personnel Flight (MPF) personnel, Inspector General (IG) personnel, inspection team members, judge advocates and paralegals, law enforcement personnel and investigators, Military Equal Opportunity (MEO) personnel, and substance abuse counselors in the course of their official Department of the Air Force duties. These personnel must obtain authorization from the member's commander prior to accessing the UIF.
 - HQ RIO Detachment Commander for Air Force Reserve (AFR) Individual Reservists
 - Air National Guard Readiness Center (NGB/HR) and the active duty servicing Force Support Squadron (FSS) for ANG Statutory Tour members, ANG Senior Leader Management Office (NGB/SL) for general officers and colonels with or pending a certificate of eligibility, and servicing FSS for all other ANG members
 - Other individuals listed in paragraph 3.1 of AFI 36-2907
- Review: All UIFs require periodic review to ensure continued maintenance of documents in the UIF is proper
- Mandatory UIF Reviews by Commanders:
 - Within 90 calendar days of assuming or being appointed to command
 - Whenever individuals are being considered for, among other things, promotion, reenlistment, permanent change of station, personnel reliability program duties, reclassification or retraining, enlisted performance reports (EPRs), or officer performance reports (OPRs)
 - Whenever Reserve and ANG members are being considered for in-residence professional military education or short courses, all Reserve assignments, statutory tour or an active duty tour exceeding 30 days, or appointment or enlistment into a different component of the Department of the Air Force

REFERENCES

AFI 36-2608, *Military Personnel Records System* (26 October 2015)

AFI 36-2907, *Adverse Administrative Actions* (22 May 2020), incorporating Change 1, 15 January 2021

AF Form 1058, *Unfavorable Information File Actions* (23 December 2020)

CONTROL ROSTERS

A control roster is a “watch list” for Airmen and Guardians whose duty performance is substandard or who fail to meet or maintain Department of the Air Force standards of conduct, bearing, and integrity, whether on or off duty. Individuals placed on a control roster are ineligible for a permanent change of station (PCS) (except for mandatory PCS), permanent change of assignment (PCA), or to attend formal training. Also, eligibility for promotion and reenlistment is limited. Commanders at all levels are authorized to use a control roster.

Purpose

- A control roster is a rehabilitative tool
- Control rosters assist commanders in controlling or evaluating a member's performance and provide the member an opportunity to improve that performance
- Other rehabilitative tools should be considered before placing a member on the control roster
- A single incident of substandard duty performance or an isolated breach of standards that is not likely to be repeated should not ordinarily be a basis for a control roster action
- Placing an individual on the control roster is not a substitute for more appropriate administrative, judicial, or nonjudicial action. Additionally, individuals are not shielded from other appropriate actions by virtue of being placed on the control roster.

Procedure

- Authority to Place Members on Control Roster:
 - Commanders on G-series orders at all levels have the authority to add members to a control roster, but members can only be removed from a control roster by the wing commander (or equivalent) or issuing authority, whichever is higher in rank. The commander must be senior to the member being placed on a control roster.
- Document control roster action on AF Form 1058, *Unfavorable Information File Actions*
- Member Response to Control Roster Action:
 - *Active Duty:* Acknowledge receipt of the action and has **three duty days** to respond. Any statement or document provided by the member in response to the control roster must be filed in the Unfavorable Information File (UIF). However, additional materials submitted by the member in mitigation, extenuation, or defense are not a part of the record.
 - *Non-Extended Active Duty (EAD) Reserve or Air National Guard (ANG) Members:* If on duty, acknowledge receipt of the action, and then has **three duty days** to respond. If the member, not in duty status, departs the duty area prior to these three duty days, he or she will have 45 days from the date of receiving the certified letter to acknowledge the notification and provide pertinent information prior to the commander making a final decision. The member is presumed to have received this correspondence if it is hand delivered or delivered by certified mail to his or her address.
- Duration of Control Roster:
 - *Active Duty:* Commanders (or equivalents) may use a control roster to establish a six month observation period
 - *Non-EAD Reserve or ANG:* The Air Force Reserve Command (AFRC), the Air Reserve Personnel Center (ARPC), Headquarters Individual Reservists Readiness Integration Organization (HQ RIO), or the Adjutant General may establish longer observation periods (control rosters), not to exceed 12 months

- If the member's conduct or performance does not improve during the observation period, the commander should consider whether a more severe response is required, such as initiating an administrative discharge
- Commanders may direct an Officer Performance Report (OPR) or Enlisted Performance Report (EPR) before entering or removing the person from the control roster
- A commander placing an officer who is eligible for or selected for promotion on a control roster must also decide if the officer is mentally, physically, morally, or professionally qualified for such promotion. If the commander determines that the member is not qualified, he or she should initiate a promotion proprietary action.
- UIF action is required if an individual is placed on the control roster
- Control roster is maintained for the commander by the Adverse Administrative Actions Manager

Consequences

- Permanent Change of Station (PCS) or Permanent Change of Assignment (PCA) reassignment is limited. For Reserve and ANG assignments, individuals remain eligible for PCS while on the control roster, though the gaining commander or Individual Mobilization Augmentee (IMA) program manager will decide if the assignment is appropriate.
- All formal training must be canceled during the period that the member is on the control roster
- Eligibility for promotions and reenlistments is limited
- Commanders may not put individuals on the control roster who are in temporary duty (TDY) or PCS status, including those en route
- A member's time on the control roster does not stop and start for period of TDY, ordinary leave, or change in their immediate supervisor. Specifically, the six month duration of the control roster action is continuous, regardless of the member's leave or TDY status.
- Placement on the control roster requires mandatory filing in the member's UIF

REFERENCES

AFI 36-2608, *Military Personnel Records System* (26 October 2015)

AFI 36-2907, *Adverse Administrative Actions* (22 May 2020), incorporating Change 1, 15 January 2021

AF Form 1058, *Unfavorable Information File Actions* (23 December 2020)

ADMINISTRATIVE DEMOTIONS

An administrative demotion is a quality force management tool available to Department of the Air Force commanders to help ensure a quality enlisted force. Administrative demotions are intended to place Airmen and Guardians at a rank commensurate with their skill level and ability. Administrative demotions are not intended to be punitive and should not be used when it is more appropriate to take actions specified by the Uniform Code of Military Justice (UCMJ).

Demotion and Appellate Authorities

- Demotion Authority – Active Duty and Air Force Reserve Members:

- E-7 and below: Group commander or equivalent level commander. An equivalent level commander is a senior Department of the Air Force officer in the grade of O-6.
- E-8 and E-9: Major command commander (MAJCOM/CC), field operating agency commander (FOA/CC), or direct reporting unit commander (DRU/CC). This demotion authority may be delegated to MAJCOM vice commander (MAJCOM/CV), Deputy Chief of Staff for Manpower, Personnel and Services, Numbered Air Force (NAF), or equivalent level commanders, but may not be further delegated.
- For Air Force Reserve members, the Air Force Reserve Commander (AFRC/CC) is the demotion authority for members serving in the grade of E-8 and E-9. This demotion authority may be delegated to NAF commanders.

- Appellate Authority – Active Duty and Air Force Reserve Members: Next higher level commander above the demotion authority

- Demotion and Appellate Authority – Air National Guard Members:

- Traditional Guardsmen E-1 to E-6: State Adjutant General. However, this demotion authority may be delegated to the wing, group, or installation commander.
- Traditional Guardsmen E-7 to E-9: State Adjutant General. However, this demotion authority may be delegated to Assistant Adjutant for Air (AAG for Air).
- Members on extended active duty under Title 10 orders: Director, Air National Guard, with concurrence of The Adjutant General (TAG) of the state
- Full-time State Active Guard and Reserve (AGR): State Adjutant General. While AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs*, does not specify a separate demotion authority for AGRs, the State Adjutant General holds the authority to initiate curtailment of AGR status for cause.

Reasons for Demotion

- Basis for a Demotion Includes:

- Officer trainees or pipeline students if eliminated from training
- Termination of student status of members attending temporary duty (TDY) Department of the Air Force schools
- Failure to maintain or attain the skill level appropriate for the grade
- Failure to fulfill Airman or Guardian, noncommissioned officer (NCO), or senior noncommissioned officer (SNCO) responsibilities, as defined in AFH 36-2618, *The Enlisted Force Structure*
- Failure to keep fit

- Failure to perform
- For reservists, unsatisfactory participation in statutory training requirements as outlined in 10 U.S.C. § 10147, DoDI 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components*, and AFMAN 36-2136, *Reserve Personnel Participation*
- The basis for the demotion must have occurred in the current enlistment **unless** the commander does not become aware of the facts and circumstances until after reenlistment
- In cases where demotion actions may be appropriate, members should be given the opportunity to overcome their deficiencies prior to the initiation of the action

Due Process

- Consult with the staff judge advocate (SJA) and Military Personnel Flight (MPF) prior to deciding a demotion action
 - SJA: Provides a legal sufficiency review of proposed demotion
 - MPF: Provides administrative assistance in assembling and routing the demotion action
- Notify the Member: Member's commander (usually squadron commander) notifies the member in writing of (1) the commander's intent to recommend demotion, (2) the demotion authority (if other than the initiating commander), (3) the recommended grade for demotion, (4) the specific reasons for the demotion action, and (5) a summary of the supporting facts
- Member Response: The member has the right to seek legal counsel and to respond (orally, in writing, or both) within three duty days (30 calendar days for non-extended active duty (EAD) Reserve members and 20 calendar days for ANG members)
 - Members eligible for retirement may apply for retirement in lieu of demotion
- Initiating Commander Decision: Following the member's response, if the commander elects to continue the proceedings, the case file is forwarded to the demotion authority for action
- Demotion Authority Action: The demotion authority fully reviews the initiating commander's recommendation, the member's response, and the member's entire military record prior to taking action
 - Demotion authority can do the following: (1) decline to demote the member, (2) approve the demotion recommendation, or (3) approve a greater or lesser demotion than recommended by the initiating commander. The demotion authority should request a written legal review from the SJA prior to deciding the demotion.
- Appeal: The member may appeal the decision of the demotion authority. The appeal is first reviewed by the demotion authority who can reverse his or her prior decision and restore the Airman and Guardian's original grade. If the demotion authority does not grant the appeal, he or she must forward the case to the appellate authority without comment or recommendation.

Grades to Demote Airmen and Guardians

- The following demotions are permitted:
 - E-2 may be demoted to E-1
 - E-3 may be demoted no lower than E-2. ANG members may be demoted to E-1.
 - E-4 through E-9 may be demoted no lower than E-3. ANG members may be demoted no lower than E-2. However, a demotion of three or more grades is only appropriate when no reasonable hope exists that the member will ever show the proficiency, leadership, or fitness that earned the initial promotion.

- High Year Tenure (HYT) Implications from Administrative Demotions: Administrative demotions may trigger mandatory HYT separations from the service. When a member is demoted, the member assumes the HYT restrictions of that grade and will be separated within 120 days of the effective date of demotion.
 - Personnel with 16 or more years of total active federal military service (TAFMS) (“Lengthy Service Qualified”): HYT revised to the 20-year point
 - Members in the grade of E-8 and below over 20 years TAFMS: HYT revised to the last day of the 6th month following demotion effective date

Restoration of Grade

- Once the demotion action is complete, the demotion authority may, if appropriate, restore the member’s original grade between three months and six months after the effective date of the demotion

Special Processing – Demotion of Reserve Members and ANG Members

- Although the rules governing demotion of an Air Force Reserve (AFR) or ANG member are similar in concept to the rules governing the demotion of active duty members, the processing requirements differ. Chapter 9 of AFI 36-2502 outlines the procedures applicable to the demotion of enlisted Air Force Reserve members and Chapter 11 of AFI 36-2502 outlines the procedures applicable to the demotion of enlisted ANG members.
- The initiating commander can, when necessary, use certified mail, return receipt requested, to advise an AFR or ANG member of his or her intention to recommend demotion, or to demote
- Following action by the demotion authority, the initiating commander must inform the AFR or ANG member in writing, by certified mail or in person, of the grade to which he or she is demoted
- Reserve members not on EAD have 30 calendar days to submit a written appeal
- ANG members have 20 calendar days to submit documentation if they non-concur with the proposed demotion

REFERENCES

Ready Reserve: Training Requirements, 10 U.S.C. § 10147

DoDI 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components* (11 March 2014), incorporating Change 1, 9 May 2015

AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs* (12 December 2014), incorporating through Change 2, (14 October 2016), including AFI36-2502_AFGM2020-01 (23 October 2020)

AFPD 36-25, *Military Promotion and Demotion* (2 November 2018)

AFH 36-2618, *The Enlisted Force Structure* (16 October 2018)

AFMAN 36-2136, *Reserve Personnel Participation* (6 September 2019)

SELECTIVE REENLISTMENT PROGRAM – ACTIVE DUTY

Reenlistment in the Department of the Air Force is not an inherent individual right. Airmen and Guardians may be considered for reenlistment if they meet eligibility requirements, have qualities essential for continued service, and can perform duty in a career field in which the Department of the Air Force has a specific need. The selective reenlistment program (SRP) is designed to ensure that the Department of the Air Force only retains and affords the privilege of continued military service to enlisted members who consistently demonstrate the capability and willingness to maintain high professional standards. The program identifies members nearing the end of their current term of service and provides a process for the commander to deny reenlistment. The SRP applies to all enlisted personnel.

Standard for Denial of Reenlistment

- Commanders and civilian directors have SRP selection authority as long as no other factors barring immediate reenlistment exist
- Commanders and civilian directors may non-select any Airman or Guardian for SRP at any time
 - A commander or civilian director's decision to render an Airman or Guardian ineligible to reenlist or ineligible for continued service can impact an Airman or Guardian's retainability and opportunity to be selected for an assignment, promotion, and/or retraining
- Commanders and civilian directors will not use the SRP to deny reenlistment when involuntary separation is more appropriate

Immediate Supervisor's Role

- Immediate supervisors are responsible for ensuring members meet quality standards
- Supervisors and commanders are notified by the Military Personnel Section (MPS) when Airmen and Guardians are nearing the end of their term of enlistment and are subject to SRP consideration. The supervisor provides recommendations for selection or non-selection to the commander.
- SRP recommendations are made using AF Form 418, *Selective Reenlistment Program (SRP) Consideration/Denial of Continued Service for Airmen*

Commander's Role

- Commanders determine whether a member should be denied reenlistment
 - Decisions to deny reenlistment should be based on a demonstrated lack of capability and an unwillingness to maintain high professional standards. Unit commanders consider the supervisor's recommendation, the member's duty performance, and career force potential before making a decision.
 - The commander will consider: ratings on Enlisted Performance Reports (EPRs), unfavorable information from any substantiated source, the Airman or Guardian's willingness to comply with Department of the Air Force standards (fitness, dress and appearance, timeliness, etc.), the Airman or Guardian's ability or inability to meet required training and duty performance levels
 - Commanders shall not consider derogatory information from a previous enlistment as a basis for denial of subsequent enlistments
 - If a Physical Evaluation Board (PEB) found an Airman or Guardian fit for duty, the Airman or Guardian may not be denied reenlistment on the basis of the same condition for which the PEB made its finding

- Commanders may reverse their SRP decisions at any time

Member Appeals of Denial of Reenlistment

- If the supervisor recommends non-selection or the commander non-concurs with the supervisor's recommendation to allow the member to reenlist, the commander must notify the member of the specific reasons for non-selection, areas needing improvement, appeal opportunity, promotion ineligibility (to include automatic cancellation of projected promotion line numbers), and the possibility of future reconsideration and selection
- Member Notification of Intent to Appeal: The member has three calendar days to notify the commander of whether he or she intends to appeal the reenlistment denial
- Member Submission of Appeal: A member's appeal is due to the Military Personnel Flight (MPF) no later than 10 calendar days of notifying the commander of his or her intent to appeal
 - Appellate Authorities:
 - *Group Commander*: First term Airmen and Guardians and retirement eligible Airmen and Guardians
 - *Wing Commander*: Second term Airmen and Guardians and those with fewer than 16 years of service at the end of their current enlistment
 - *Secretary of the Air Force (SecAF)*: Airmen and Guardians with more than 16 years of service but less than 20 years of service at the expiration of their current enlistment
 - Any commander in the reviewing chain may approve an Airman or Guardian's appeal as it is routed to the ultimate appellate authority. However, only the appellate authority has final appeal denial.
 - After the case file has been considered by the appellate authority, the appeal decision is final and the case cannot be sent to a level above that authority to have the decision overturned
- Legal Review of Reenlistment Denial Appeals: A legal review is required when a member appeals SRP decisions. Commanders should contact the servicing legal office prior to notifying a member of a non-selection decision.

Collateral Impact of Reenlistment and/or Denials

- SRP non-selection makes Airmen and Guardians ineligible for promotion and also automatically cancels projected promotion line numbers
- Once a member reenlists, any misconduct taking place in the earlier enlistment generally cannot be used as a basis for an administrative discharge action

REFERENCES

- AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force* (20 September 2019), incorporating Change 1, 27 January 2021
- AF Form 418, *Selective Reenlistment Program (SRP) Consideration/Denial of Continued Service for Airmen* (12 April 2021)

SELECTIVE REENLISTMENT PROGRAM (SRP) – AIR FORCE RESERVE (AFR) AND AIR NATIONAL GUARD (ANG)

The quality of the Air Force Reserve (AFR) and Air National Guard (ANG) depends on the quality of its enlisted members. Reenlistment in any Total Force component, to include the AFR and ANG, is a privilege and not a right. Commanders have significant discretion in making reenlistment decisions. In making this determination, commanders should primarily consider the member's initial eligibility and performance.

Selective Reenlistment Program (SRP)

- Members may be considered for reenlistment in the AFR if they meet eligibility requirements, have qualities essential for continued service, and can perform duty in a career field in which the Department of the Air Force has a specific need
- Prior to the expiration of term of service (ETS), a commander will consider whether the member should be selected or denied reenlistment
- The selection or non-selection decision will be consistent with qualitative factors and criteria and will not be based solely on the member's career intent

Standard for Denial of Reenlistment

- When considering AFR and ANG members for reenlistment, commanders will review: supervisor recommendations, EPR ratings, unfavorable information from any substantiated source, compliance with Department of the Air Force standards (fitness, dress and appearance, timeliness, etc.), ability to meet required training and duty performance levels, potential, grade and skill-level, aptitude, education, motivation, self-improvement efforts, training and participation, derogatory information, physical condition, medical readiness, attitude and behavior, assumption of responsibilities, and other related information

Common Factors Precluding Reenlistment

- Unsatisfactory participation, performance, attitude, military bearing, or behavior
- Currently undergoing nonjudicial punishment (Article 15) action
- Under consideration for administration discharge
- Conscientious objectors whose religious convictions preclude unrestricted assignment
- Awaiting Surgeon General's (AFRC/SG) consideration of a physical disqualification
- Even when policy does not prohibit a member from reenlisting, the commander should carefully consider whether the member meets the Department of the Air Force's quality standards

Non-Selection for Reenlistment

- Pre-Coordination: Commanders should contact the servicing legal office prior to notifying a member of a non-selection decision
- Commander Action: The commander or supervisor completes AF Form 418, *Selective Reenlistment Program (SRP) Consideration/Denial of Continued Service for Airmen*, when not selecting a member for reenlistment and notifies the member of the non-selection
- Lengthy Service Exception to Denial of Reenlistment: Except for physical disability or for cause, members may not be denied reenlistment if they have completed at least 18 but less than 20 years satisfactory service for retirement purposes. Specifically, 10 U.S.C. § 1176 prohibits Air Force Reserve Command (AFRC) from involuntarily separating enlisted personnel within sanctuary.

Appeals of Denial of Reenlistment – AFR

- Members who have not been selected for reenlistment have a right to appeal
 - Member must submit a written appeal to the Military Personnel Flight (MPF) by the next scheduled Unit Training Assembly (UTA) or 30 days after the date he/she was notified, whichever is later. The member may submit favorable information or written statements on their behalf from those that have knowledge of the member.
 - Members may appeal non-selection for reenlistment through one of two options:
 - *Senior Rater Appeal*: Unit members may appeal to their Senior Reserve Commander for final selection or non-selection authority
 - *Denial of Reenlistment Appeal Board*: A member may present their appeal to a three-person appeal board which will review all documentation and make a recommendation to the member's senior Reserve commander for final action
 - The MPF selects members, who are approved by the Senior Reserve Commander
 - At least one board member must be a field grade officer
 - For enlisted appeal boards, board members must be E-7 and above
- Under either appeal option, the ultimate decision of the member's Senior Reserve Commander is final

Appeals of Denial of Reenlistment – ANG

- Members who have not been selected for reenlistment have a right to appeal
 - Member must submit a written appeal to the MPF no later than 10 calendar days (for Drill Status Guardsman, submit the appeal during the next regularly scheduled drill (RSD)) from the date he or she notified the commander of his or her intent to appeal
 - The member's appeal and supporting documentation is forwarded to the appropriate appellate authority outlined in Table 11.1 of AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*. Any commander in the reviewing chain may approve a member's appeal. However, after the case file has been sent to the appropriate appellate authority and the appeal has been denied, the case file cannot be sent to the next higher authority to have the decision overturned.

REFERENCES

Enlisted Members: Retention After Completion of 18 or More, But Less Than 20, Years of Service, 10 U.S.C. § 1176

AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force* (20 September 2019), incorporating Change 1, 27 January 2021

AF Form 418, *Selective Reenlistment Program (SRP) Consideration/Denial of Continued Service for Airmen* (1 April 2021)

OFFICER AND ENLISTED EVALUATION SYSTEMS

The single most important element needed for successful mission accomplishment is performance. The officer evaluation system (OES) and the enlisted evaluation system (EES) are the Department of the Air Force's programs for evaluating and documenting performance. Commander involvement in the program is critical to developing and retaining a high-caliber force.

- The Department of the Air Force evaluation system is generally comprised of the Airman Comprehensive Assessment (ACA) (i.e., initial and mid-term rater performance feedback), Enlisted Performance Reports (EPRs), Officer Performance Reports (OPRs), Letters of Evaluation (LOEs), and training reports (TRs)
- The servicing Military Personnel Section (MPS) provides command support and guidance regarding officer and enlisted evaluations. Air Force Personnel Center (AFPC) provides training and guidance on their website.
- Unit commanders should encourage first-time supervisors to obtain OES/EES training within 60 days of being appointed as a rater. Additionally, the commander should encourage all unit members to receive general OES/EES training on an annual basis as needed.
- Access to Evaluations: Evaluations are For Official Use Only (FOUO), subject to the Privacy Act, and exempt from public disclosure. Only persons who have a proper need to know may read the evaluations.

Airman Comprehensive Assessment

- The first step in the evaluation of any Department of the Air Force member is initial and midterm performance feedback provided to the member by their rater
 - Initial Feedback: Within 60 days of a change in supervision
 - Midterm Feedback: Halfway through the member's rating period
- ACA is mandatory for all active duty Department of the Air Force members and Air Reserve Component (ARC) members in the grade of E-1 to O-6
- ACA sessions must provide realistic feedback to improve the ratee's performance and written comments, not just marks on the form. Any behavior that may result in administrative or punitive action should be documented in a separate document.
- The rater provides the original ACA worksheet to the ratee. The rater may keep a copy for personal reference, but the ACA worksheet will not be made part of any official personnel record nor be included in an individual's PIF, **UNLESS** the ratee introduces it first or alleges that he or she did not receive required feedback or claims the sessions were inadequate.

Performance Reports – General Considerations

- OPRs and EPRs are critical in nearly every personnel decision within the Department of the Air Force. They form the basis for promotion, training, reenlistment, and other administrative decisions. A poorly managed evaluation system inadequately identifies top performers and undermines confidence in the fairness of the system.
- Performance reports should take into account any adverse administrative or punitive actions taken against the individual during the rating period
- Improperly processed evaluations may limit commanders' options when pursuing adverse administrative actions against poor performers
- Disagreements between evaluators (i.e., primary rater and senior rater) should be explained in the disagreeing rater's comments block

- Preceding evaluators are first given an opportunity to change the evaluation; however, they will **NOT** change their evaluation just to satisfy a disagreeing senior evaluator
- If, after discussion, the disagreement remains, the disagreeing evaluator marks the “non-concur” block and must provide specific comments in their block to explain each item in disagreement. An AF Form 77, *Letter of Evaluation*, may be attached when necessary as a continuation sheet to capture the specifics of the disagreement.

Performance Reports – Timing

- OPRs: Complete OPRs in accordance with timing requirements set forth in Table 3.2 (active duty and Air National Guard members) and Table 3.3 (Air Force Reserve members) of AFI 36-2406, *Officer and Enlisted Evaluations Systems*
- EPRs:
 - All EPRs are subject to a “static close out date” (SCOD). The SCOD is the fixed annual date that all enlisted evaluations will close-out for a specific grade. It is used to determine the final time-in-grade (TIG)/time-in-service (TIS) eligible pool for forced distribution allocations.
 - EPRs cannot be signed before the SCOD
 - Table 4.7 and Table 4.8 of AFI 36-2406 details the force distribution allocations for enlisted members in the grades of E-4 to E-6
 - All enlisted personnel in the grade of E-4 through E-9 will receive an evaluation as of the appropriate SCOD for their grade. Airmen and Guardians serving in the grade of E-1 through E-3 will receive an evaluation upon completing a minimum of 36 months TIS as of the E-4 SCOD, 31 March.
 - The local Force Support Squadron (FSS) is the point of contact (POC) for any questions by raters

Performance Reports – Required and Prohibited Comments

- Some specific comments or entries are required and must be included in OPRs and EPRs. These comments should be drafted as stated in AFI 36-2406. Slight deviations are allowed, but entries significantly deviating from the recommended format are unacceptable. These comments and entries include, but are not limited to:
 - For a referral report or training report (TR), the evaluator must specifically detail the behavior or performance that caused the report to be referred (referral reports are discussed in detail below)
 - Explaining any significant disagreement with a previous evaluator on a performance report
 - Comments relating to the ratee’s behavior are mandatory on the ratee’s next OPR, EPR, TR, and an officer’s next promotion recommendation form (PRF), if the ratee has been convicted by a court-martial
 - If performance feedback was not accomplished, the reason why it was not accomplished must be stated
- Certain comments are inappropriate to include in performance reports. Generally, raters are prohibited from including comments regarding:
 - Duty history or performance outside the current reporting period, except as allowed by paragraphs 1.12.3.4 and 1.12.4.1 of AFI 36-2406
 - Comments referring to ACA sessions, except in the “Performance Feedback Certification” block

- Events that occur after the close-out date
- Any action against an individual that resulted in an acquittal or failure to implement an intended personnel action. This does not necessarily bar commenting on the underlying misconduct that formed the basis for the action, but consult with the servicing staff judge advocate (SJA) before doing so.
- Actions taken by a member outside the normal chain of command that represent guaranteed rights of appeal, such as issues raised with the inspector general
- Race, ethnic origin, gender, age, religion, sexual orientation, or political affiliation of the ratee
- Temporary or permanent disqualification under DoDM 5210.42_AFMAN 13-501, *Nuclear Weapons Personnel Reliability Program (PRP)*
- Participation in drug or alcohol abuse rehabilitation programs
- Performance as a court-martial member
- Punishment received as a result of an administrative or judicial action. Restrict comments to the conduct or behavior that resulted in the action and the type of administrative or judicial action taken.

Mandatory Reporting of Ratee's Criminal Convictions to Rater

- By order of the Secretary of the Air Force (SecAF) and as outlined in paragraph 1.8.1 of AFI 36-2406, **ALL** Department of the Air Force officers and enlisted members who are on active duty or in an active status in the Air Reserve Component (ARC) **must** report, in writing, to his or her rater, within 72 hours, any conviction for a violation of a criminal law of the United States or violations of a criminal law of any other country
 - Active duty and ARC members in active status must report the conviction to his or her rater (first-line military supervisor)
 - ARC members not in active status must report the conviction to their wing commander or equivalent at the first drill period or within 30 calendar days of the date of the conviction, whichever is earlier
 - Individual Ready Reserve (IRR) members must report the conviction to the Air Reserve Personnel Center (ARPC) within 30 calendar days of the date of the conviction
 - For purposes of this policy, the term "conviction" includes a plea or finding of guilty, a plea of *nolo contendere* (no contest), and all other actions tantamount to a finding of guilty, including adjudication withheld, deferred prosecution, entry into adult or juvenile pretrial intervention programs, and any similar disposition of charges
 - For purposes of this policy, a criminal law of the United States includes any military or other Federal criminal law, any State or equivalent criminal law or ordinance, and any criminal law or ordinance of any county, parish, municipality, or local subdivision of any such authority, ***other than motor vehicle violations that do not involve a court appearance***
- Commanders and/or supervisors who have questions regarding whether a particular conviction triggers the mandated comment should consult with his or her SJA

Referral Reports

- Certain comments or ratings in a performance report may result in it being “referred” to the ratee for comments. An evaluator whose ratings or comments cause a report to become a referral report must give the ratee a chance to comment on the report.
- Refer a Performance Report When:
 - Comments in any OPR, EPR, LOE, or TR (to include attachments), regardless of the ratings, are derogatory in nature, imply or refer to behavior incompatible with or not meeting Department of the Air Force standards of personal or professional conduct, character, judgment, or integrity, and/or refer to disciplinary actions
 - An evaluator marks “Does Not Meet Standards” in Section III or in any performance factor in Section IX of the OPR
 - An evaluator marks “Met some but not all expectations” or “Do Not Retain” in any section of the EPR
- The procedures involved when referring an OPR or EPR are provided in AFI 36-2406, beginning with paragraph 1.10 (see AFI 36-2406, Figure 1.1, for referral memorandum)

REFERENCES

Privacy Act, 5 U.S.C. § 552a

DoDM 5210.42_AFMAN 13-501, *Nuclear Weapons Personnel Reliability Program (PRP)* (19 September 2018), including DoDM5210.42_AFMAN13-501_AFGM2020-01, 14 April 2020

AFI 36-2406, *Officer and Enlisted Evaluations Systems* (14 November 2019), including AFI36-2406_AFGM2021-01, 13 January 2021

AF Form 77, *Letter of Evaluation* (12 February 2009)

AF Form 475, *Education/Training Report* (29 March 2017)

AF Form 707, *Officer Performance Report (Lt thru Col)* (31 July 2015)

AF Form 724, *Airman Comprehensive Assessment Worksheet (2Lt thru Col)* (1 July 2014)

AF Form 724-A, *Airman Comprehensive Assessment Addendum* (13 January 2021)

AF Form 910, *Enlisted Performance Report (AB thru TSgt)* (30 November 2015)

AF Form 911, *Enlisted Performance Report (MSgt thru SMSgt)* (31 July 2015)

AF Form 912, *Enlisted Performance Report (CMSgt)* (29 May 2015)

AF Form 931, *Airman Comprehensive Assessment (ACA) Worksheet (AB through TSgt)* (28 July 2017)

AF Form 932, *Airman Comprehensive Assessment (ACA) Worksheet (MSgt through CMSgt)* (14 September 2017)

OFFICER PROMOTION PROPRIETY ACTIONS

Promotion is an advancement to a position of greater responsibility based on the requirements of the Department of the Air Force and the officer's future potential, and it is not a reward for past service. Commanders may recommend that the Secretary of the Air Force (SecAF) take action when an officer is not qualified for promotion, should be removed from a promotion list, or have the officer's promotion date delayed. In such cases, the commander presents information to SecAF for a determination. These actions are known as officer promotion propriety actions. Generally, only SecAF (or designee) may end an officer promotion delay action or approve a promotion list removal action.

Preliminary Considerations

- Promotion Propriety Actions are **NOT** intended for use as a disciplinary action
- Before initiating a promotion propriety action, the commander, to include Air Force Reserve (AFR) and Air National Guard (ANG) commanders, **MUST** determine if a *preponderance of the evidence* shows it is more likely than not that the officer is not mentally, physically, morally, or professionally qualified to perform the duties of a higher grade
- If an officer is not qualified to perform the duties of the next grade, the proper authority must take promotion propriety action before the effective date of promotion
- If commanders believe an officer is not qualified to perform the duties of the next grade, they should speak with the servicing staff judge advocate (SJA) to determine whether sufficient evidence exists to support a promotion propriety action
- Before initiating a promotion propriety action to delay an officer's promotion date, consider whether there is enough time to observe the officer and make a determination that the officer is qualified to promote prior to their promotion date
- The AF Form 4363, *Record of Promotion Propriety Action*, must state specifically why the commander believes the officer is not mentally, physically, morally, or professionally eligible to promote to the next higher grade

Not Qualified for Promotion (NQP)

- To be eligible for promotion, all officers are obliged to meet the "exemplary conduct" standard set forth in 10 U.S.C. §§ 8583 and 9233
- The officer's immediate commander initiates the recommendation to SecAF to find the officer NQP and forwards it with appropriate coordination to the major command commander for review
- For officers meeting central selection boards, the NQP recommendation case file must arrive at the Air Force Personnel Center (AFPC) before the board convenes. This recommendation is valid for only one selection board.
- Before separating a second lieutenant found NQP, an attempt should be made to retain the officer on active duty for six months from the date promotion would have occurred (unless retention is inconsistent with good order and discipline) and give the officer an opportunity to overcome any problem and qualify for promotion
- NQP should never be used in place of discharge proceedings or other appropriate disciplinary actions

Removal from a Promotion List

- The officer's immediate commander initiates the removal action by making a recommendation to the reviewing authority (usually the wing commander). If the wing commander concurs, the recommendation and package are forwarded to AFPC through the servicing military personnel flight (MPF). The package then goes to SecAF, who must approve any removal action.
- The immediate commander's verbal notification of removal action automatically delays the officer's promotion until SecAF makes a decision on the removal action
- If the officer is projected to promote close in time to the notification, close coordination with the servicing MPF and AFPC should also occur
- The package must contain appropriate documentation that has been served on the member. Appropriate documentation includes administrative action, judicial or non-judicial punishment, reports of investigation, commander directed investigations, and any other documentation that supports the recommendation.

Delaying a Promotion

- A commander may take action to delay a promotion if there is cause to believe that the officer has not met the requirement for exemplary conduct set forth in 10 U.S.C. § 8583 or is not mentally, physically, morally, or professionally qualified to perform the duties of the higher grade. Commanders may also delay a promotion if:
 - Sworn charges against the officer are pending review and disposition by an officer exercising general court-martial jurisdiction (GCMCA) over the officer
 - An investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer
 - The officer's record is being reviewed by a board convened under 10 U.S.C. § 60
 - The officer is pending a criminal proceeding in a federal or state court
 - The Secretary of Defense (SecDef) or SecAF is reviewing substantiated adverse information about the officer that is material to the decision to appoint the officer
- Initiating a Promotion Delay: The officer's immediate commander initiates the promotion delay by making a recommendation to the reviewing commander (usually the wing commander) before the effective date of promotion and forwards it to AFPC through the servicing MPF. If the reviewing commander does not agree that the officer's promotion should be delayed, the action is terminated and not forwarded to AFPC.
- Effective date of Promotion Delay: The promotion delay is effective when the immediate commander notifies the officer of the delay, either verbally or in writing
- Approval Authority for Promotion Delays: The reviewing commander (usually the wing commander) approves initial promotion delays up to six months from the officer's original effective date of promotion. **ONLY** SecAF may grant extensions up to an additional 12 months following the initial promotion delay.
- A written package should be served on the officer as soon as practicable. The package should list all the documents served on the officer and contain a thorough statement as to why the officer is not mentally, physically, morally, or professionally ready to promote to the next higher grade.
- Member's Response to Promotion Delay: The officer whose promotion is delayed may make a written response to SecAF

- Authority to Terminate Promotion Delay: Commanders may initiate action to end the delay at any time by using AF Form 4364, *Record of Promotion Delay Early Termination and/or Date of Rank Adjustment*. However, generally, **ONLY** SecAF (or designee) has authority to end a promotion delay.
 - Notwithstanding the commander's recommendation, SecAF (or designee) may promote an officer on his or her original effective date, promote an officer with a date of rank adjustment, extend the officer's promotion delay, or remove the officer from the promotion list
 - A reviewing commander may terminate a delay **ONLY** when the delay was initiated to conduct an investigation or inquiry, and upon completion, there was no finding or conclusion that substantiated or partially substantiated any allegation and no disciplinary action of any kind (administrative, non-judicial, or judicial) is taken against the officer

Promotion Propriety Action Procedures

- Notification to Officer: The commander must inform the officer, verbally or in writing, of the promotion propriety action before the effective date of promotion
- Notification in Writing is Preferred: If written notification is not possible, confirm the verbal action in writing as soon as possible
- Statement of Reasons: The action itself must contain a clear statement stating why the officer should be removed from the promotion list, or why the officer's promotion should be delayed, or why the promotion delay should be terminated. The recommendation **MUST** list the evidence that was served on the officer supporting the action. It must also show that the affected officer had an opportunity to review the information and respond to it if desired.
- Officer's Response: The officer should acknowledge the action and be allowed five duty days to respond. Include in the package any comment from the officer.
- AFI 36-2501, *Officer Promotions and Selective Continuation*, Chapter 5, contains procedures for processing promotion propriety actions

REFERENCES

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- Separation of Regular Officers for Substandard Performance of Duty or For Certain Other Reasons, 10 U.S.C. § 60
- Removal from a List of Officers Recommended for Promotion, 10 U.S.C. § 629
- Requirement for Exemplary Conduct, 10 U.S. C. § 8583
- Requirement of Exemplary Conduct, 10 U.S.C. § 9233
- Removal from a List of Officers Recommended for Promotion, 10 U.S.C. § 14310
- AFI 36-2501, *Officer Promotions and Selective Continuation* (16 July 2004), incorporating through Change 3, 17 August 2009, including AFI36-2501_AFGM2020-01, 4 May 2020
- AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force* (9 January 2003), incorporating through Change 5, 19 October 2007, certified current 22 January 2010
- AF Form 4363, *Record of Promotion Propriety Action* (10 June 2008)
- AF Form 4364, *Record of Promotion Delay Resolution* (17 December 2020)

ENLISTED PROMOTION PROPRIETY ACTIONS

Department of the Air Force commanders are authorized to delay enlisted promotions or remove enlisted members from an approved promotion list when the commander deems it necessary in the interests of good order and discipline. Department of the Air Force promotion policy is to select individuals for promotion based on potential to serve in the next higher grade. The following tools are available to commanders when managing enlisted promotions.

Non-Recommendation for Promotion

- An enlisted member is considered ineligible for promotion when non-recommended or removed from the promotion list by the promotion authority before the effective date of promotion, commonly referred to as “*redlining*”
- Standard: An Airman or Guardian’s behavior does not adhere to established standards
- A promotion authority can non-recommend E-3s and below in monthly increments up to six months. All other ranks are non-recommended for one specific promotion cycle at a time.
- Airmen also become ineligible for promotion under other circumstances as outlined in AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs*, Table 1.1, which include, but are not limited to:
 - Placement on the control roster
 - Serving a probationary period as part of an involuntary discharge action
 - Pending administrative demotion action
 - Under a suspended reduction in grade imposed through nonjudicial punishment under Article 15, UCMJ
 - Disqualified from a previously awarded Air Force Specialty Code (AFSC) for cause or disqualified from a previously awarded AFSC not for cause and awaiting discharge
 - Conviction by court-martial, or undergoing punishment or suspended punishment imposed by a court-martial, or on appellate leave
 - Conviction by a civilian court (excluding minor traffic violations), or undergoing punishment or suspended punishment, probation, or work release program, or any combination of these or similar court-ordered conditions
 - Failed or non-current fitness assessment as of the promotion eligibility cutoff date

Withholding of Promotion

- The immediate commander has the authority to withhold a promotion for up to one year after a member’s selection for the next higher grade, but before the effective date of promotion
- Only a higher authority (wing or equivalent level commander) may approve withholding of promotions longer than one year. Equivalent level commander is the first senior rater in a commander’s position in the Airman or Guardian’s reporting chain.
- Withholding a promotion is not intended to be used as a punishment or inducement for an Airman or Guardian to conform to acceptable standards of performance. This action allows the commander to evaluate unique or unusual events so a sound promotion decision can be made.
- The reasons for withholding a promotion can be found in AFI 36-2502, Table 1.2, which include, but are not limited to, when the member is:
 - Awaiting a decision on an application as a conscientious objector

- Under court-martial or civilian charges
- Placed into the Alcohol and Drug Abuse Prevention and Treatment program (ADAPT)
- Under investigation or the subject of an inquiry (formal or informal) that may result in action under the UCMJ or prosecution by civilian authorities. Under the circumstances, the commander may continue to withhold promotion when the investigation or inquiry is complete but no determination has been made as to the action the military or civilian authorities will take.
- When the member failed a fitness assessment after the promotion eligibility cutoff date (PECD) or after having been selected for promotion (line number)
- When requested by the member's commander based on other reasons with prior approval from the individual's wing commander
- Effect on Date of Rank: If the commander terminates the withhold action, the member receives his/her original date of rank, and the effective date is the date the commander terminates the withhold action and recommends promotion

Deferral

- A deferral is a delay in promotion for a specified period of time for members serving in the grade of E-5 through E-9
- The promotion authority may defer promotion to E-5 or higher for one to three months
- Wing or equivalent level commanders may approve deferring promotion beyond three months to members serving in the grades of E-5 through E-7. The equivalent level commander is the first senior rater in a commander's position in the Airman or Guardian's reporting chain.
- Standard: A deferral action may be used to allow the commander to determine if the member meets acceptable behavior and performance standards for the higher grade. If there is clear evidence that the member is not suited to take on the increased responsibilities of the higher grade because he or she does not adhere to established standards, then non-recommendation is the right course of action, not deferral.
- Effect of Date of Rank: The date of rank and effective date is the first day of the month after the deferral period ends and cannot be retroactive

Procedures

- When non-recommending, deferring, or withholding promotions, the commander informs the member of adverse actions before the promotion effective date. If the notification is verbal, the commander must confirm in writing within five duty days.
- The notification must include specific reasons, dates, occurrences, and duration of the action
- The notification and the Airman's acknowledgment is maintained in the Automated Records Management System (ARMS)
- Air Force Reserve: AF Form 224, *Recommendation and Authorization for Promotion of Airman as Reserve of the Air Force*, is used to document promotions and non-recommendation actions

REFERENCES

AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs* (12 December 2014), incorporating through Change 2, 14 October 2016, including AFI36-2502_AFGM2020-01, 23 October 2020

AF Form 224, *Recommendation and Authorization for Promotion of Airman as Reserve of the Air Force* (22 June 2012)

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CHAPTER THREE: NONJUDICIAL PUNISHMENT UNDER ARTICLE 15, UCMJ

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NONJUDICIAL PUNISHMENT (NJP) OVERVIEW AND PROCEDURES

Nonjudicial punishment (NJP) under Article 15, UCMJ, provides commanders with an essential and prompt means of maintaining good order and discipline outside of the court-martial process. NJP is designed to promote positive behavior changes in service members without the stigma of a court-martial conviction.

Overview

- Generally, any *commander* who is a *commissioned officer* may impose NJP for minor offenses committed by members under his/her command
- NJP procedures provide quick disciplinary action for a commander while maintaining due process for the accused member

Prerequisites

- UCMJ Offenses: NJP is solely utilized for the disposition of UCMJ offenses. In other words, NJP may be imposed for acts or omissions that are “minor offenses” under the punitive articles of the UCMJ.
- Minor Offenses: The decision to impose NJP is a matter of discretion for the imposing commander
 - Commanders should consult with the servicing staff judge advocate (SJA) or his/her designee regarding all possible disposition for allegations
 - Factors to consider for determining whether an offense is minor and, in turn, whether NJP is the appropriate forum for disposition include:
 - The nature of the offense and the circumstances surrounding its commission
 - The member’s age, rank, duty assignment, record, and experience
 - The effect of both the misconduct and the resulting NJP on good order and discipline
 - The maximum sentence imposable for the offense if tried by general court-martial
 - Ordinarily, a minor offense is an offense for which the maximum punishment imposable would not include a dishonorable discharge or confinement for longer than one year
- Statute of Limitations: Unless the member is absent without leave (AWOL) or fleeing from justice, NJP may not be imposed for offenses committed more than two years before the date of NJP punishment imposition absent a written and signed waiver of the statute of limitation from the member
- Standard of Proof:
 - There is no specific standard of proof applicable to NJP proceedings in the Department of the Air Force
 - Commanders should recognize that a member has the option to turn down the offer of NJP and demand trial by court-martial, in which case proof beyond a reasonable doubt by legal and competent evidence is required for conviction. Whether such evidence is available should be considered before initiating an NJP. Additionally, commanders should understand the consequences of offering NJP without sufficient evidence (i.e., an acquittal at court-martial).

- If the evidence does not rise to a sufficient level of proof, either before offering NJP or after the member submits his/her response to the NJP, commanders may pursue alternative disposition options (e.g., Letter of Reprimand (LOR), or, if warranted, administrative discharge)
- Commanders should recognize the following legal evidentiary standards of proof:
 - Probable Cause: Reasonable grounds to believe. This standard requires facts or evidence that would lead a reasonable person to believe that an accused has committed a crime. It is the standard of proof necessary to authorize a search and/or seizure of a member's person or property and the standard of proof required to prefer and refer court-martial charges.
 - Preponderance of the Evidence ("more likely than not."): The allegation is more likely to be true than not true. It is the standard of proof necessary to discharge a member from the Air Force and Space Force and the standard required to be shown to substantiate an allegation in a Commander Directed Investigation (CDI).
 - Clear and Convincing Evidence: The allegation/evidence being presented is "highly" and "substantially" more likely/probable to be true rather than untrue
 - Proof Beyond a Reasonable Doubt: Proof that leaves one "firmly convinced" of guilt. This is the highest legal standard that must be met in order to convict an accused at a criminal trial in all jurisdictions across the United States.
- Limitations on Commander's Authority: Commanders may only impose NJP on members of their command
 - *Shared Authority of Parent and Temporary Duty Assignment (TDY) Unit Commanders*: If a member is not attached to TDY command, the home station commander should handle the disposition of NJP. If the member is attached to TDY command, the TDY commander should confer with the member's parent organization to determine the member's background, past duty performance, and other relevant factors before initiating any NJP action.
- Withholding of NJP Authority by Superior Commanders: Commanders at any echelon may withhold from any subordinate commander all or part of the authority — including the authority to impose NJP for specific types of offenses — that the subordinate would otherwise have under the UCMJ
 - Withholding of NJP authority by a superior commander should be in writing and filed with the SJA's office
 - Withholding of authority by a superior commander generally does not constitute unlawful command influence because it represents the independent exercise of command by the superior commander
- Timeliness Required: Commanders, investigators, and legal personnel all play a role in the swift administration of NJPs. AFI 51-202, *Nonjudicial Punishment*, outlines the metrics established to assist in ensuring the timely administration of justice.
 - To assist in expediting the administration of justice, 80% of all NJP actions should be completed within 39 days from the report/discovery of the offense
 - Commanders should offer NJPs within 21 days of the date of discovery of the offense
 - The "date of discovery" is the first date when an investigative agency (e.g., Air Force Office of Special Investigations (AFOSI), Security Forces Office of Investigations (SFOI), Inspector General (IG), legal office (JA), commander, supervisor, or first sergeant) becomes aware of the allegation and has identified a subject

- Commanders should serve punishment on members within nine (9) days of service of the NJP
- The servicing SJA should complete his/her review of the NJP within nine (9) days of the service of punishment
- Failing to meet the above processing goals does not preclude a commander from initiating NJP proceedings

Procedures

- Forum Choice: For the accused member, NJP is a choice of forum and not an admission of guilt. As such, a commander cannot involuntarily impose NJP under Article 15 (unless the member is embarked on a naval vessel). However, a commander may offer an NJP to an accused member to adjudicate an alleged misconduct in lieu of doing so at a court-martial.
- SJA Consultation Required: Commanders must confer with the SJA or his/her designee prior to both initiation of NJP proceedings and imposition of punishment. The military justice section of the base legal office prepares the appropriate AF Form 3070, *Record of Nonjudicial Punishment Proceedings*.
- Offering NJP: Commanders initiate NJP action by serving the member with the appropriate AF Form 3070
 - A member must always be informed of the identity of the commander who will make the findings and punishment decision before the member makes an election to accept NJP or demand court-martial
 - If a new commander assumes responsibility for the case after the member was offered NJP proceedings, but before findings are made, inform the member of the identity of the new commander and provide three additional duty days for the member to decide whether to accept the NJP proceedings or demand trial by court-martial
 - Although referenced as AF Form 3070, this form is subdivided based on grade and status
 - AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru SSgt)*. This form is also used by the Air National Guard (ANG) for accused members in the grades of Airman Basic to Staff Sergeant.
 - AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt)*
 - AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officers)*
 - AF Form 3070D, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt)*. This form is used solely by the ANG for accused members in the grades of Technical Sergeant to Chief Master Sergeant.
 - AF Form 3070E, *Record of Nonjudicial Punishment Proceedings (Officers)*. This form is used solely by the ANG for accused members serving in any officer grade.

Accused Member's Rights

- An accused service member served with an NJP has three duty days in which to decide whether to "accept" NJP as the "forum" for their case
- Unless embarked on a naval vessel, an accused has the right to refuse an NJP and to demand trial by court-martial

- “Accepting” NJP as the forum is **NOT** an admission of guilt. It is simply a choice by the member not to assert their right to a trial by court-martial and to instead allow the commander to determine his/her guilt and punishment, if the commander finds him/her guilty. After accepting NJP as the forum, the member has the right, at their discretion, to either contest or admit guilt.
- An accused service member has the following rights in the NJP process. When responding to the offer of NJP on the AF Form 3070, the accused member must annotate whether they exercised the following rights by initialing in the appropriate box:
 - Right to Counsel:
 - Commanders should encourage members to consult with the area defense counsel (ADC) in all cases
 - An appointment with an ADC should be established on behalf of a member prior to the commander notifying that member of the commander’s intent to impose NJP. Typically, an appointment with an ADC will be arranged for the member by the First Sergeant or by legal office personnel prior to the member being notified of the offer of NJP.
 - Review of Evidence: The accused member has the right to examine all statements and evidence the commander reviewed in arriving at the decision to offer NJP. The legal office normally supplies the evidence to the ADC.
 - Presentation of Evidence: If a member decides to accept NJP, he/she is entitled to present matters in defense, mitigation, and extenuation. Members may present matters in person, in writing, or both.
 - *Written Matters*: Must be submitted within three duty days, unless the commander grants an extension for good cause shown
 - *Personal Appearance*: May be public or private. Except under extraordinary circumstances or when the imposing commander is unavailable, a member is generally entitled to appear personally before the imposing commander and present matters in defense, mitigation, or extenuation. If the member chooses to make a personal appearance, the member also has the right to:
 - Be accompanied by a spokesperson (who does not have to be a lawyer)
 - Present witnesses who are reasonably available
 - *Public Personal Appearances*: A member may request that a personal presentation be open to the public
 - The commander may open the personal appearance to the public, even though the member does not request it or agree that the appearance should be open
 - “Public” NJP personal appearances should neither be intended as, nor result in, the shame or humiliation of the member. For example, public NJP at a commander’s call, unit training assembly, or other public gathering would be inappropriate (unless the member consents). Rather, NJP proceedings may be attended by a limited number of people in a more private setting (i.e., the commander’s office).
 - The individuals in attendance at NJP proceedings should normally be limited to those in the member’s supervisory chain or people who can assist the commander in making a decision

Commander's Findings

- Commanders must refrain from determining or considering punishment until guilt has been determined based on all the evidence, as well as the matters submitted by the member
- After a full and fair consideration of all matters in defense, mitigation, and extenuation, the commander must first determine whether or not the member committed the offense:
 - If the commander determines the accused to be "not guilty," or deems that NJP is not appropriate under the circumstances, the NJP process terminates
 - If the commander determines the member to be "guilty" of one or more of the listed offenses, the commander must then determine what punishment to impose upon the member for the offense(s)

Determining a Punishment

- Commanders are required to confer with the SJA before imposing punishment, except where impracticable due to military exigencies. The legal office will normally input the appropriate punishment language on the AF Form 3070.
- Commanders should tailor the punishment to the offense and the member
 - Ordinarily, the commander should impose the least severe punishment sufficient to correct and/or rehabilitate the member
 - For example, commanders should generally impose an unsuspended reduction in grade (e.g., "hard bust") in combination with forfeitures of pay only when the maximum exercise of NJP authority is warranted (e.g., repeat offender, most serious offenses, past rehabilitative efforts have failed, or recalcitrant offender). This general policy does not preclude such punishment where warranted in the sound exercise of judgment by the commander imposing punishment.
- If a change in commander occurs after imposition of punishment but before the appeal decision has been made, the member must be informed in writing of the identity of the new commander and his/her acknowledgment of this change must be obtained

Punishment Limitations

- General Limitations: Punishment limitations based upon the commander's grade and the member's grade are summarized in AFI 51-202, Tables 3.1 and 3.2, and on page 3 of each AF Form 3070
- Specific Punishment Limitations: There are limitations on the combination of certain punishments
 - *Restriction to Limits and Extra Duties*: If restriction and extra duties are combined, they must run concurrently (i.e., at the same time) and must not exceed the maximum time imposable for extra duties (45 days when field grade or general officers impose punishment and 14 days when company grade officers impose punishment)
 - *Arrest in Quarters*: Reserved for officers only and cannot be combined with restriction
 - *Forfeiture of Pay*: Unless the commander otherwise specifies, unsuspended forfeitures of pay take effect on the date the commander imposes punishment
 - *Reductions in Grade*: Unless the commander otherwise specifies, unsuspended reductions in grade take effect on the date the commander imposes punishment. Suspension of other punishments take effect on the imposition date.

Appeals

- Members are entitled to appeal an NJP to the commander who imposed the original punishment and then to the next superior authority in the commander's chain of command
 - *Scope of Appeal*: The member may appeal the guilty finding, the punishment, or both
 - A member of the Air Force Reserve is not required to make his/her appeal election in Title 10 status or in person
 - *Timeline for Appeal*: Five calendar days after accused member's notification of punishment. Commanders may grant extensions for good cause shown (written requests only).
 - *Submission of Matters*: Members must submit all evidence supporting an appeal to the commander who imposed the original punishment
- Final Appeal – Superior Commander: After considering any new matters submitted by the member, the imposing commander may deny all relief, grant partial relief, or grant all relief requested by the accused member. If the imposing commander does not grant all the requested relief, he/she must forward the appeal to the appellate authority through the servicing SJA. If the imposing commander is a section commander of a squadron, the next superior authority is the squadron commander's superior commander.
 - *Final action on Appeal*: The appellate authority may deny all relief, grant partial relief, or grant all relief requested by the member. The appellate authority's decision is *final*.
 - *No Stay on Previously Approved Punishments*: Punishments are not stayed during the appeal process. Punishment will run until overturned on appeal. However, any unexecuted punishment involving restraint or extra duties will be delayed until after appeal if the member requests such a delay and the appellate authority has not already decided the case within five days.

Officer NJP Reporting Requirements

- All NJP actions involving general officers must be reported to the Secretary of the Air Force, Inspector General, Senior Official Inquiries Directorate (SAF/IGS) when the NJP is initiated and when final action is complete
- All NJP actions involving all other officers must be reported to the Secretary of the Air Force, Inspector General, Complaints Resolution Directorate (SAF/IGQ) when the NJP is initiated and when final action is complete

NJP Forwarding and Criminal Indexing Requirements

- The Department of the Air Force, through AFOSI and Security Forces, must submit offender criminal history record data and fingerprints to the Federal Bureau of Investigation (FBI) when there is probable cause to believe an identified individual committed a qualifying offense
 - Qualifying offenses are listed in DoDI 5505.11, *Fingerprint Reporting Requirement*
- All completed NJPs for qualifying offenses must be forwarded by the servicing legal office to the investigating law enforcement agency (AFOSI/SFOI), or if there was no law enforcement involvement, directly to the Department of the Air Force Criminal Justice Information Cell (DAF-CJIC)
- In any case where an accused is found to have committed an offense under Article 112a, UCMJ, for possessing or using a controlled substance listed on the Controlled Substances Act schedules, the commander is responsible for notifying the member using an AF Form 177, *Notice of Qualification for Prohibition of Firearms, Ammunition, and Explosives*, that they are prohibited from purchasing or possessing a firearm for a period of one year. Commanders

should coordinate this notification with their servicing legal office and Department of the Air Force law enforcement agency, as appropriate.

Specific Rules Involving Disposition of Misconduct for Air National Guard Members

- Air National Guard (ANG) members not on Title 10 orders, who are neither subject to NJP nor court-martial jurisdiction, may be subject to other measures similar to NJP and court-martial by virtue of their respective state code. Under these circumstances, commanders should consult with the servicing SJA for the ANG member's unit.

Specific Rules Involving NJP for Reserve Service Members

- Jurisdiction over Offenses by Reservists: A reserve commander **MUST** be in Title 10 status to offer NJP and sign AF Form 3070 and the reserve member **MUST** be in Title 10 status when served the AF Form 3070
- Involuntary Recall of Reservists for Imposition of NJP: A reserve member generally cannot be involuntarily ordered to a duty status solely for purposes of initiating or completing NJP actions. However, Article 2, UCMJ, does permit a MAJCOM commander or equivalent to grant waivers in appropriate cases.
- NJP Authority – Traditional Reservists (CAT A): Air Reserve Component (ARC) unit commanders have UCMJ authority over reserve members assigned or attached to their respective units, even if the reserve member is deployed
 - *Concurrent Authority over Traditional Reservists*: Active Duty (AD) commanders of Reserve members have concurrent UCMJ authority over all Reserve members attached to their respective units
 - Commanders of TDY or deployed Traditional Reservist **MUST** coordinate with the reserve member's parent organization commander prior to NJP imposition
- NJP Authority – Individual Mobilization Augmentees (IMAs) (CAT B): The Readiness Group (RMG) commander has UCMJ authority over all IMA reservists attached or assigned to the RMG
 - *Concurrent Authority over IMAs*: Active duty commanders have concurrent UCMJ authority over IMA reservists attached to their unit for reserve duty, for temporary duty, or for deployment
- Withholding of NJP Authority: Authority to issue NJP on Reserve commissioned officers is withheld from all Reserve commanders, except those who are general officers or who exercise general court-martial convening authority and their principal assistants to whom Article 15 power has been delegated
- Timeliness Required: Commanders must take prompt action to offer NJP to Reserve members as soon as practicable after an offense is discovered for which the commander deems NJP appropriate
 - *Traditional Reservists*: NJP should generally be offered no later than the next Unit Training Assembly (UTA) after the offense is discovered or the investigation is completed
 - *IMA Reservists*: NJP should be offered as soon as possible following discovery of the allegation
 - Failure to meet this suggested processing goal **DOES NOT** preclude commanders from initiating NJP proceedings at a later date

- Extended Response Time for Reservists: A reserve member not in Title 10 status for at least 72 hours after being offered NJP should be required to respond at the start of the next military duty day (i.e., UTA), provided at least 72 hours have passed since the NJP was offered. A failure to respond within 30 calendar days is considered a waiver of his/her right to respond unless an extension was granted.
- Punishment Limitations for Reservists: There are limitations on the punishment that can be imposed on Reserve members
 - *Restrictions on Liberty*: Because a reserve member cannot be required to arrive before, or remain after, a UTA to serve punishment arising from the imposition of NJP, arrest in quarters, restriction to base, and extra duties should not be imposed unless the reserve member is expected to serve on extended active duty (EAD) orders or perform an annual tour (AT)
 - *No Limitations on UTAs*: Barring a reserve member from participating in UTAs is not an authorized punishment under Article 15, UCMJ
 - *Forfeiture of Pay*: Since Reserve members not on EAD typically work only two days of military duty per month, the forfeiture provision of the Article 15 does not carry the same disciplinary weight for Reserve members as it does for active duty members. If the member does not perform any duty during the stated period of the sentence, no forfeiture collection will be made.
- Appeals: Reserve members not in Title 10 status for at least five days following receipt of punishment waive their appeal rights by failing to make an election within 30 calendar days of that receipt

REFERENCES

UCMJ art. 15

Manual for Courts-Martial, United States, pt. V (2019)

DoDI 5505.11, *Fingerprint Reporting Requirement* (31 October 2019)

AFI 51-202, *Nonjudicial Punishment* (6 March 2019), including AFI51-201_AFGM2020-01, 14 May 2020

AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018), incorporating Change 1, 30 September 2020

AFMAN 71-102, *Air Force Criminal Indexing* (21 July 2020)

AF Form 177, *Notice of Qualification for Prohibition of Firearms, Ammunition, and Explosives* (30 July 2020)

AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru SSgt)* (19 March 2019)

AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt)* (19 March 2019)

AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)* (28 March 2019)

AF Form 3070D, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt) – Air National Guard Only* (2 April 2019)

AF Form 3070E, *Record of Nonjudicial Punishment Proceedings (Officers) – Air National Guard Only* (2 April 2019)

SUPPLEMENTARY NONJUDICIAL PUNISHMENT (NJP) ACTIONS

Supplementary nonjudicial punishment (NJP) actions provide commanders with the flexibility to make adjustments based on the response of the NJP recipient. These supplementary actions include: (1) *Suspension*: postponement of the application of all or part of the punishment for a specific probationary period, conditioned upon good behavior; (2) *Mitigation*: lessening of punishment by quality or quantity; (3) *Remission*: cessation of the remainder of any unexecuted period of punishment; (4) *Set Aside*: full reinstatement of prior rights and privileges impacted by NJP; and (5) *Vacation*: reinstatement of previously suspended punishment in the event of misbehavior during the probationary period.

Initiating a Supplementary Action

- With the exception of a vacation action, supplementary NJP actions are accomplished on AF Form 3212, *Record of Supplementary Action under Article 15, UCMJ*, and are filed with the original NJP action
- Initiation by Member: Post-punishment relief or supplementary action may be requested by members (use the sample format in AFI 51-202, *Nonjudicial Punishment*, Attachment 4)
- Initiation by Commander: Either the original commander who imposed the NJP, or a successor commander, may also initiate supplementary action
- Staff Judge Advocate (SJA) Consultation Required: Commanders should consult with the SJA prior to acting on any supplementary action

Suspension

- Definition: Suspension postpones all or part of a punishment for a specific probationary period. A suspension can be used as part of both an original or supplementary action. In original actions, the commander can suspend punishment at the time of imposition, thereby holding part or all of a punishment in reserve as a motivational tool for the NJP recipient.
- Standard: Suspension is generally appropriate for a first-time offender or where there are persuasive extenuating or mitigating circumstances
- Specific Rules for Suspension:
 - Suspension of punishment may not exceed six months from the date of the suspension
 - Commanders may, at any time, suspend any part or amount of the unexecuted punishment imposed
 - An executed punishment of reduction in grade or forfeiture may be suspended if accomplished within four months of the punishment being imposed
 - When a reduction in grade is later suspended, the member's original date of rank, held before the reduction, is reinstated for the purposes of promotion. However, the date of rank for the purposes of pay is the date of the document directing the suspension. The member is not entitled to back pay.
 - If a member is undergoing a suspended reduction in grade, the member is ineligible for promotion, including testing and consideration if already tested. They are also ineligible to reenlist but may be eligible for an extension of enlistment.

Mitigation

- Definition: Mitigation is a reduction in either the quantity or quality of a punishment. The general nature of the mitigated punishment should remain the same as the original punishment.
- Standard: Mitigation is appropriate when the member's subsequent good conduct merits a reduction in the punishment, or when the commander later determines the punishment imposed was disproportionate to the offense
- Specific Rules for Permissible Mitigated Punishments: With the exception of reduction in grade, only the unexecuted part or amount of the punishments can be mitigated
 - *Reductions in Grade*: A reduction in grade may be mitigated even after it has been executed
 - Reduction in grade may only be mitigated to forfeitures and may only be done up to four months after the date of execution
 - The mitigation date will become the member's date of rank for both promotion and pay purposes. The member will not be entitled to receive back pay.
 - *Restriction to Limits/Extra Duties*: Punishments involving loss of liberty, such as restriction to specified limits or extra duties may only be mitigated to less severe forms of loss of liberty
 - Loss of liberty punishments cannot be mitigated to forfeitures or reduction in grade
 - Mitigated restraints on liberty (i.e., mitigating correctional custody to extra duties) cannot run for a longer period than the remaining amount of punishment that was originally imposed

Remission

- Definition: Remission is the cancellation of any unexecuted portion of a punishment
- Standard: Remission is appropriate when the member's subsequent good conduct merits a reduction in the punishment, or when the commander later determines the punishment imposed was disproportionate to the offense
 - Commanders may remit punishments any time before the execution of the punishment is completed. For example, if 30 days has elapsed on 45 days of extra duty and the commander wants to end the punishment now, the commander may remit the remaining 15 unexecuted days of extra duty.
 - An unsuspended reduction in rank is executed at imposition, so it can never be remitted

Set Aside

- Definition: Set aside occurs when the punishment, or any part or amount thereof, whether executed or unexecuted, is removed from the record and any rights, privileges, pay, or property affected by the relevant portion of the punishment are restored to the member. It is the most sweeping form of supplementary action. **A set aside of all punishment voids the entire NJP action.**
 - Unlike suspension, mitigation, and remission, setting aside a punishment is not normally considered rehabilitative in nature and **should not** be used on a routine basis
- Standard: Commanders should exercise this discretionary authority only in the rare and unusual case where a question concerning the guilt of the member arises or where the best interests of the Air Force and Space Force are served by clearing the member's record
 - *Time Limits*: Punishments should be set aside within a reasonable time (four months, except in unusual circumstances) after the punishment is originally imposed

Vacation

- Definition: Imposing punishment that was previously suspended either at the time the original NJP was imposed or as part of supplementary NJP relief
- Standard: Imposed if a member violates either a condition of the suspension specified in writing by the commander in the NJP or any punitive article of the UCMJ
 - A new serious offense may be the basis for a vacation action AND additional NJP action
 - The new offense does not have to be serious enough to warrant imposition of NJP, nor does it have to be of the same nature as the original offense
 - Reserve members need not be subject to the UCMJ during the commission of an offense that serves as the basis for vacating suspended punishment
- SJA Consultation Required: Commanders must consult the servicing SJA before taking action to vacate suspended punishment

Procedure for Vacation Actions

- The commander must notify and advise the member of the intended vacation action by causing the member to be served with an AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*. A reserve commander initiating a vacation action must be in Title 10 status when signing and serving the vacation action. The AF Form 366 must contain the following:
 - A description of the basis for the vacation, such as misconduct (new offense which the commander suspects the member has committed) or what condition of the member's suspension was violated
 - The fact that the commander is considering vacating the suspended punishment
 - The member's rights during the vacation proceedings
- The base legal office will input the language describing the offense and other pertinent information concerning the suspended punishment on the AF Form 366
- The member must receive the AF Form 366 during the period of the suspension, at which point the suspension period is stayed
- Member's Rights during Vacation Proceedings
 - Unlike other supplementary actions, vacation action is detrimental to the member and therefore comes with due process protections similar to NJP, namely: (1) three duty days to respond; (2) right to consult counsel; (3) right to submit written matters; and (4) right to request a personal appearance before the imposing commander
 - *Reserve Members*: A reserve member not in Title 10 status for at least 72 hours after being served the vacation action should be required to respond at the start of the next military duty day (i.e., Unit Training Assembly (UTA)), provided at least 72 hours have passed since the vacation was served. A failure to respond within 30 calendar days is considered a waiver of his/her right to respond, unless an extension is granted.
 - *Reserve Commanders*: The Reserve commander and member must both be in Title 10 status at the time the member makes his/her election and during any personal appearance made by the Reserve member

- *Failure to respond*: If the member fails to respond within three duty days (30 days for a non-extended active duty (EAD) reserve member), the commander can continue by noting that the “member failed to respond” in item 3 of the AF Form 366. However, if the commander believes the failure to respond was out of the member’s control, the commander may not proceed with the vacation proceedings without good cause.
- Commander’s Decision – Vacation Proceedings
 - Following the commander’s consideration of the evidence, including any matters presented by the member, the commander (who must be in Title 10 status if he/she is a Reserve commander) takes one of the following actions on the AF Form 366:
 - Terminates the vacation proceedings because vacation of the suspended punishment is not appropriate or because the member did not violate the UCMJ or a condition of the suspension; or
 - Finds the member did violate the UCMJ or a condition of the suspension
- Effects of Vacation Action on Suspended Reductions
 - If a suspension of a reduction in grade is “vacated,” the member’s date of rank, for the purposes of promotion, will be the date the commander imposed the original punishment
 - For the purposes of pay, however, the date of rank will be the day the suspension is vacated. The member will not be required to return any additional pay received while holding the higher rank.

REFERENCES

UCMJ art. 15

Manual for Courts-Martial, United States, pt. V (2019)

AFI 51-202, *Nonjudicial Punishment* (6 March 2019), including AFI51-202_AFGM2020-01, 14 May 2020

AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment* (29 March 2019)

AF Form 3212, *Record of Supplementary Action under Article 15, UCMJ* (29 March 2019)

QUALITY FORCE MANAGEMENT EFFECTS OF NONJUDICIAL PUNISHMENT (NJP)

Commanders have a great deal of discretion concerning quality force management consequences related to nonjudicial punishment (NJP) actions with respect to enlisted personnel. Additional regulations and quality force management consequences apply to NJPs imposed upon officers. Generally speaking, there are three main possible follow-on force management ramifications of NJP action: (1) placement of the NJP in an Unfavorable Information File (UIF); (2) placement of the NJP in a Senior Non-Commissioned Officer promotion selection record or Officer Selection Record (OSR); and (3) follow-on “referral” enlisted or officer performance reports. As regulations have recently changed and continues to change, it is imperative that commanders consult with the staff judge advocate (SJA) regarding the quality force management consequences of NJP actions on officers. Keep in mind that the provisions of AFI 36-2907, *Adverse Administrative Actions*, apply to all active duty and Reserve Air Force military members and Air National Guard (ANG) members on Title 10 orders. For ANG personnel on Title 32 status, the guidance contained in AFI 36-2907 must be followed unless otherwise directed by state law.

Unfavorable Information File NJP Entries

- Mandatory Entries: Entry of an NJP into an UIF becomes mandatory based upon either the status of the member or the severity of the punishment imposed
 - *Officers*: All officer NJPs are mandatory UIF entries
 - *Enlisted*: UIF entry is required if any portion of the executed or suspended punishment will not be completed within 1 month (31 days or more)
 - Post-punishment actions to suspend a previously imposed punishment must be filed in the member’s UIF, with the original NJP action, until the suspension period is completed
 - Actions to vacate a suspended punishment must be entered into the member’s UIF
- Discretionary Entries: All other NJPs are “discretionary” UIF entries at the election of the imposing commander
- Notice: Members are entitled to notice that the action will be entered into a UIF. Such notice is included on AF Form 3070, *Record of Nonjudicial Punishment Proceedings*.
- UIF Retention Period: NJP actions entered into a UIF must remain there until all punishment is completed or remitted, including any periods of suspension
 - *Mandatory UIF*: If the commander takes no action to remove a mandatory UIF NJP action, it will remain in the UIF for **two years**
 - *Discretionary UIF*: If the commander takes no action to remove a discretionary UIF NJP action, it will remain in the UIF for **one year**
- Early Removal of NJP from UIF: The commander may remove the NJP action and related documents from the member’s UIF any time **after** the punishment or suspended punishment is completed (if removal is clearly warranted), or if the Article 15 is set aside

Related Administrative Actions

- In addition to NJP, commanders may take other appropriate administrative actions, including, but not limited to:
 - Control roster action

- Entry of the member into counseling or rehabilitation programs, such as the Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT)
- Enlisted Performance Report (EPR) comments concerning the member's underlying misconduct (referral EPR)
- Administrative discharge
- Removal from the personnel reliability program (PRP), withholding a security clearance, or withholding access to sensitive materials
- NJP may also adversely affect promotion, reenlistment, and assignment eligibility

Officer Unfavorable Information File NJP Entries

- Any record of an NJP action for officers is a mandatory UIF entry
- An NJP is permanently retained in the officer's Master Personnel Record Group (Correspondence and Miscellaneous Group) unless set aside in its entirety, or ordered removed by the Air Force Board of Corrections for Military Records (AFBCMR)
- Retention Period: Officer NJP actions are retained in a UIF for **two years**
 - Early removal is only permissible after completion of all punishment. Only the wing commander or issuing authority (whomever is higher in rank) is authorized to remove an officer NJP from a UIF
- Referral OPR/PRF Consideration: Commanders should also consider whether comments should be made in the next OPR and/or promotion recommendation form (PRF). Seek the advice of the SJA for assistance in determining when comments may be appropriate.
 - NJPs issued for sexual related offenses require a mandatory notation in the officer's next OPR and/or PRF

Officer and Senior Non-Commissioned Officer (SNCO) Promotion Selection Records

- Commanders imposing NJP upon enlisted members in the grade of E-6 and above must also decide whether to include the NJP action in the member's promotion selection record. The selection record decision is recorded on the AF Form 3070B.
 - Reviewing Authority: The imposing commander's decision to file an NJP in an enlisted member's promotion selection record is subject to review by the next senior Department of the Air Force commander, unless the General Court-Martial Convening Authority (GCMCA) imposed the punishment
 - SNCO Selection Record Retention Period: **Two years** or until after the member meets one SNCO evaluation board. Early removal is authorized for NCOs (E-6 and above) only if approved by the current commander.
- All adverse information an officer receives, to include NJP, must be filed in the Officer's Selection Record. If an NJP imposed upon an officer is upheld, the imposing commander **MUST** annotate on the AF Form 3070C that the NJP will be filed in the member's OSR.
- OSR Retention Period: Adverse information filed in the OSR will remain in the OSR for O-6 and below promotion boards and processes for ten years from the date of command action
 - Except for the set aside of NJP action, earlier removal of adverse information from the OSR may only be directed by the AFBCMR

REFERENCES

UCMJ art. 15

Manual for Courts-Martial, United States, pt. V (2019)

DoDI 1320.14, *DoD Commissioned Officer Promotion Program Procedures* (16 December 2020)

AFI 36-2406, *Officer and Enlisted Evaluation Systems* (14 November 2019), including
AFI36-2406_AFGM2021-01, 13 January 2021

AFI 36-2608, *Military Personnel Records System* (26 October 2015)

AFI 36-2907, *Adverse Administrative Actions* (22 May 2020), incorporating Change 1, 15 January
2021, certified current 15 January 2021

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018),
incorporating Change 1, 21 November 2019, with corrective actions applied, 19 December 2019

AFI 51-202, *Nonjudicial Punishment* (6 March 2019), including AFI51-202_AFGM2020-01,
14 May 2020

AFMAN 71-102, *Air Force Criminal Indexing* (21 July 2020)

AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru SSgt)* (19 March 2019)

AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt)* (19 March 2019)

AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)* (28 March 2019)

AF Form 3070D, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt) – Air National
Guard Only* (2 April 2019)

AF Form 3070E, *Record of Nonjudicial Punishment Proceedings (Officers) – Air National Guard Only*
(2 April 2019)

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CHAPTER FOUR: ADMINISTRATIVE SEPARATION FROM THE AIR FORCE

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INVOLUNTARY SEPARATION OF ACTIVE DUTY ENLISTED MEMBERS: GENERAL CONSIDERATIONS

Commanders and supervisors must identify enlisted members who show a likelihood for early separation and make reasonable efforts to help these members meet Department of the Air Force standards. Members who do not show potential for further service should be discharged. Commanders must consult the servicing staff judge advocate (SJA) and military personnel flight (MPF) before initiating the involuntary separation of a member. Administrative separation of active duty Department of the Air Force enlisted members is governed by AFI 36-3208, *Administrative Separation of Airmen*. Involuntary separation of members of the Air National Guard (ANG) and Air Force Reserve is governed by the provisions of AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*.

General Preprocessing Considerations

- Before initiating discharge, a commander must consider the member's potential for future useful services, as well as all the factors that make the member subject to discharge, including:
 - The seriousness of circumstances that make the member subject to discharge and how the member's retention might affect military discipline, good order, and morale
 - Whether the circumstances that are the basis for discharge action will continue or recur
 - The likelihood that the member will be disruptive or an undesirable influence in present or future duty assignments
 - The member's ability to perform duties effectively in the present and in the future
 - The member's potential for advancement and leadership
 - An evaluation of the member's military record including, but not limited to:
 - Records of nonjudicial punishment
 - Records of counseling
 - Letters of reprimand or admonishment
 - Records of conviction by courts-martial
 - Records of involvement with civilian authorities
 - Past contributions to the Department of the Air Force
 - Duty assignments and Enlisted Performance Reports (EPRs)
 - Awards, decorations, and letters of commendation
 - The effectiveness of preprocessing rehabilitation, when required
- A commander should **NOT** use an administrative discharge as a substitute for disciplinary action
- Generally, the acts or conditions on which the discharge is based must have occurred in the current enlistment. **The exceptions are:**
 - Fraudulent enlistment, erroneous enlistment, or the interest of national security
 - Cases in which the act or condition occurred in the immediately preceding enlistment and the commander was not aware of the facts warranting discharge until after the member reenlisted and there was no break in service

- Cases in which the member is being separated for failure in the fitness program and at least one instance of unsatisfactory performance is in the current enlistment. Under these circumstances, instances of unsatisfactory performance in the immediately preceding enlistment may support the basis for discharge.
- Prior to processing a member for discharge for parenthood, conditions that interfere with military service, entry level performance and conduct, unsatisfactory performance, and minor disciplinary infractions or a pattern of misconduct, commanders must give the member an opportunity to overcome deficiencies
 - Efforts to rehabilitate may include, but are not limited to, counseling, reprimands, control roster action, nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), change in duty assignment, demotion, additional training, and retraining
 - It is extremely important to properly document rehabilitative efforts and keep copies of these documents

Special Processing – Members Diagnosed with or Reasonably Asserting Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI)

- All enlisted Airmen and Guardians being recommended for involuntary separation who have deployed overseas in support of a contingency operation or were sexually assaulted during the previous 24 months and have been diagnosed with or reasonably assert post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) must receive a medical examination. The medical examination must assess whether the effects of PTSD or TBI constitute matters in extenuation that relate to the basis for involuntary administrative separation. The medical examination is required if the member:
 - Is being administratively separated under a characterization that is not either Honorable or Under Honorable Conditions (General);
 - Was deployed overseas to a contingency operation or sexually assaulted during the previous 24 months;
 - Has been diagnosed by a physician, clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse as experiencing PTSD or TBI, or reasonably alleges the influence of PTSD or TBI based on deployed service to a contingency operation or a sexual assault that occurred during the previous 24 months; **and**
 - Is not being separated under a sentence of court-martial, or other proceeding conducted pursuant to the UCMJ
- Members diagnosed with or reasonably asserting PTSD or TBI will not be separated until the result of the medical examination has been reviewed by appropriate authorities responsible for evaluating, reviewing, and approving the separation action, to include (if applicable): the initiating commander, administrative discharge board, convening authorities, separation authority, Air Force Review Board, and/or the Secretary of the Air Force (SecAF)

Special Preprocessing Considerations for Service Members Who Have Made an Unrestricted Report of a Sexual Assault

- Airmen and Guardians who made an unrestricted report of sexual assault and who are within one year of final disposition of his or her sexual assault allegation may request a general officer to review the circumstances of and grounds for any recommendation of his or her involuntary separation from the Department of the Air Force

- The general officer review is conducted by the general court-martial convening authority (GCMCA) or, if the GCMCA is not a general officer, the first general officer in the member's chain of command
- An enlisted member entitled to GCMCA review must be notified of this right in the separation notification memorandum
- The member must submit his or her request for GCMCA review in writing. In this request, the member must affirmatively assert that he or she believes the pending discharge action was initiated in retaliation for making a report of sexual assault.
- A member who submits a timely request to the GCMCA may not be separated until the GCMCA conducting the review concurs with the circumstances of and grounds for the involuntary separation

Characterizations of Service

- The service of a member administratively separated may be characterized as honorable, general (under honorable conditions), or under other than honorable conditions (UOTHC)
 - Honorable: Appropriate when the quality of the member's service generally has met Department of the Air Force standards of acceptable conduct and performance of duty, or a member's service is otherwise so meritorious that any other characterization would be inappropriate
 - General (under honorable conditions): Appropriate if a member's service has been honest and faithful, but significant negative aspects of the member's conduct or performance outweigh positive aspects of military record
 - UOTHC: Appropriate if based on a pattern of behavior or one or more acts or omissions constituting a significant departure from the conduct expected of Airmen and Guardians. This characterization can be given only if the member is offered an administrative discharge board or if a discharge is unconditionally requested in lieu of trial by court-martial.
- A dishonorable discharge and a bad conduct discharge are punitive discharges and are authorized only as a result of a court-martial sentence
- If the sole basis for discharging an Airman or Guardian with a UOTHC service characterization is a serious offense that resulted in conviction by a court-martial that did not adjudge a punitive discharge, then SecAF must approve the service characterization. However, the following courts-martial are not authorized to impose a punitive discharge, and are thus not limited by this paragraph:
 - Summary courts-martial
 - Cases referred to a special court-martial by military judge alone pursuant to Article 16(c) (2)(A), UCMJ
 - Any courts-martial where the military judge accepts a pretrial agreement or plea agreement provision whereby the accused and the convening authority agree the accused will not be sentenced to a punitive discharge
- Separation without Service Characterization: Members in entry level status (the first 180 days of active military service) will ordinarily receive an "entry level separation" without service characterization

How Characterization of Service Affects Veteran's Benefits

- The U.S. Department of Veterans Affairs (VA) provides several benefits to veterans including the GI Bill, home loan benefits, disability compensation, and other benefits. More information on the availability of veteran's benefits can be found at www.benefits.va.gov.
- To become eligible for veteran's benefits, the active duty member must have been discharged or released under conditions other than dishonorable. The term "dishonorable" is broader in the context of determining VA benefit eligibility.
- In general, to qualify for VA educational benefits (e.g., GI bill) an honorable discharge is required

REFERENCES

Members Diagnosed With or Reasonably Asserting Post-Traumatic Stress Disorder or Traumatic Brain Injury: Medical Examination Required Before Administrative Separation, 10 U.S.C. § 1177

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2020-01, 1 July 2020

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

INVOLUNTARY SEPARATION OF ACTIVE DUTY ENLISTED MEMBERS: REASONS FOR DISCHARGE

Specific reasons for involuntarily separating active duty enlisted members are set forth in Chapter 5 of AFI 36-3208, *Administrative Separation of Airmen*. Commanders must consult with the servicing staff judge advocate (SJA) and military personnel flight (MPF) prior to initiating the involuntary separation of a member. With a few exceptions, a commander is generally not required to initiate involuntary separation of a member just because a reason for discharge set out in AFI 36-3208 exists. The facts and circumstances are different in each case and must be considered on a case-by-case basis. An overview of the nine broad reasons for discharge of active duty enlisted members follows below. Involuntary separation of members of the Air National Guard (ANG) and Air Force Reserve (AFR) is governed by the provisions of AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* and Tables 2.1 and 3.1 of AFI 36-3209 sets forth broad reasons for discharge of ANG and AFR members.

Mandatory Involuntary Discharge Processing

- A commander **MUST** initiate discharge processing or seek a waiver of the discharge if the reason for discharge is one of the following:
 - Fraudulent or erroneous enlistment
 - Civilian court conviction for an offense for which a punitive discharge and confinement for one year or more would be authorized under the Uniform Code of Military Justice (UCMJ)
 - Drug abuse
 - Sexual assault or sexual assault of a child
 - Failure in the fitness program: a commander must make a discharge or retention recommendation when a member fails four fitness assessments in a 24-month period

Convenience of the Government Discharges

- Discharge is appropriate when separation would serve the best interest of the Department of the Air Force and discharge for cause is not warranted. Such separations may be based on:
 - Parenthood, if the member fails to meet military obligations because of parental responsibilities
 - Insufficient retainability for required training, if the cost of retraining for a brief period of service may not warrant retention
 - Medical/Psychological conditions that interfere with military service but not rising to the level of “disabilities” severe enough to warrant medical discharge via a Medical Evaluation Board (MEB)
 - Mental Disorders:
 - Must be supported in writing by a report of evaluation by a psychiatrist or PhD-level clinical psychologist that confirms a diagnosis of a disorder contained in the current edition of the Diagnostic and Statistical Manual of Medical Disorders;
 - Must be documented in a report as so severe that the member’s ability to function in the military environment is significantly impaired;
 - The documentation must show that prior to initiation of discharge the member has been formally counseled concerning deficiencies and afforded an opportunity to overcome them. [NOTE: The unit commander is responsible to ensure the counseling requirement has been met]; and

- Must include documentation from the member's supervisory chain that the condition or disorder has resulted in an adverse effect on the member's assignment or duty performance
- Special processing is required for Airmen who are currently serving or who have served in an imminent danger pay area and have been diagnosed with a personality disorder that is the basis of the discharge. Additionally, special processing is required, if the member deployed overseas in support of a contingency operation or was sexually assaulted during the previous 24 months and has been diagnosed with or reasonably asserting Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI)
- The diagnosis of a personality disorder must specifically address PTSD or other mental illness co-morbidity
- Separation **WILL NOT** be initiated if there is a diagnosis of service-related PTSD, unless the Airman is subsequently found fit for duty under the disability evaluation system in accordance with AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*
- The Department of the Air Force Surgeon General (SG) must review the diagnosis and concur with supporting documentation prior to initiation of the separation. If the SG does not concur with the diagnosis, no further action will be taken.
- Discharge for conditions that interfere with military service is not appropriate if the member's record supports discharge for another reason, such as misconduct or unsatisfactory performance
- Service is characterized as entry level separation or honorable
- Before recommending discharge, commanders must be sure:
 - Preprocessing rehabilitation requirements in AFI 36-3208, paragraph 5.2, have been met;
 - They have complied with all requirements of the specific Department of the Air Force instruction paragraph authorizing discharge; and
 - Circumstances do not warrant discharge for another reason

Defective Enlistments

- Enlistment of Minors: A person under 17 years of age is barred by law from enlisting
- Void Enlistments: An enlistment may be void because the individual is under age or for a reason other than minority
- Erroneous Enlistment: The Department of the Air Force should not have accepted the enlistee, but the case does not involve fraud
- Fraudulent Entry: Involved deliberate deception on the part of the enlistee
- Action Required of the Commander: A commander who has information that shows an enlistment may be erroneous or fraudulent must verify the information as soon as possible
 - If the member is subject to discharge for erroneous enlistment or fraudulent entry, the commander must act promptly to recommend the member's discharge for erroneous enlistment or fraudulent entry, discharge for another reason, or a waiver of the option to discharge

- Authorized characterizations of service and the approval authorities are listed in AFI 36-3208, Table 5.4
- Members approved for discharge are **NOT** eligible for probation and rehabilitation (P&R)

Entry Level Performance or Conduct

- Enlisted members in entry level status should be discharged when unsatisfactory performance or conduct shows the member is not a productive member of the Department of the Air Force
- Discharge processing must start during the first 180 days of continuous active duty
- Eligibility for discharge based on entry level performance or conduct does not preclude separation for another reason
- Before processing a member for discharge for unsatisfactory entry level performance or conduct, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented
- Discharge is not formally characterized, but is described as entry level separation (ELS)
- Members approved for discharge for entry level performance or conduct are **NOT** eligible for P&R

Unsatisfactory Performance

- Members should be discharged when unsatisfactory performance or conduct shows they are not qualified for service in the Department of the Air Force
- Performance includes assigned duties, military training, bearing and behavior, as well as maintaining the high standards of personal behavior and conduct required of all military members at all times
- Unsatisfactory performance may be evidenced by any of the following:
 - Unsatisfactory duty performance, which may include:
 - Failure to properly perform assigned duties
 - A progressively downward trend in performance ratings
 - Failure to demonstrate the qualities of leadership required by the member's grade
 - Failure to maintain standards of dress and personal appearance, other than fitness standards, or military deportment
 - Failure to progress in military training required to be qualified for service with the Department of the Air Force or for the performance of primary duties
 - Irresponsibility in the management of personal finances
 - Unsanitary habits
 - Failure to meet fitness standards
- Before processing a member for discharge for unsatisfactory performance, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented
- Service is characterized as honorable, under honorable conditions (general), or entry level
- Members approved for discharge should be considered for P&R

Failure in Drug or Alcohol Abuse Treatment

- Members are subject to discharge for failure in drug or alcohol abuse treatment if they:
 - Are in a program of rehabilitation for abuse of drugs or alcohol and fail to complete the program due to inability, refusal to participate, or unwillingness to cooperate; and
 - Lack the potential for continued military service or need long-term treatment and are transferred to a civilian medical facility for treatment
- Service is characterized as honorable, general, or entry level
- Members approved for discharge are eligible for P&R

Misconduct Discharges

- Unacceptable conduct adversely affects military duty and may be a proper basis for discharge
- Types of misconduct include:
 - Minor Disciplinary Infractions (AFI 36-3208, paragraph 5.49): Consists solely of infractions during the current enlistment resulting in letters of counseling (LOCs), letters of admonishment (LOAs), letters of reprimand (LORs), and nonjudicial punishment (NJP) actions
 - Before processing a member for discharge for misconduct consisting of minor disciplinary infractions, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented
 - Members approved for discharge are eligible for P&R
 - Pattern of Misconduct (AFI 36-3208, paragraph 5.50): Includes misconduct more serious than that consisting of minor disciplinary infractions such as (1) discreditable involvement with military or civilian authorities, (2) conduct prejudicial to good order and discipline, (3) failure to support dependents, or (4) dishonorable failure to pay just debts
 - Before processing a member for discharge for misconduct consisting of a pattern of misconduct, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented
 - Members approved for discharge are eligible for P&R
 - Civilian Conviction (AFI 36-3208, paragraph 5.51): When the member is convicted, or there is a finding that amounts to a conviction of an offense which would authorize a punitive discharge under the UCMJ, or when the sentence by civilian authorities actually includes confinement for six months or more
 - A commander must initiate discharge or seek a waiver of the discharge when the civilian conviction involves an offense for which a punitive discharge and confinement for one year or more would be authorized under the UCMJ
 - It is general policy to withhold execution of discharge until the outcome of the appeal is known or the time for appeal has passed. If the appeal results in the conviction being set aside, the Airman or Guardian may not be discharged due to civilian conviction.
 - An Airman or Guardian whose home of record is in the continental United States (CONUS) may be discharged in absentia if he or she is in civil confinement in the CONUS or has been release from confinement in the CONUS and is absent without authority
 - An Airman or Guardian in a foreign penal institution may not be discharged until released from confinement and returned CONUS or higher authority (Air Force Personnel Center (AFPC)) authorizes an exception

- If the commander has knowledge of such a civilian conviction and fails to act within a reasonable time, that failure to act may result in a constructive waiver of the commander's ability to discharge the member
- Members approved for discharge are eligible for P&R
- Commission of a Serious Offense (AFI 36-3208, paragraph 5.52): Includes offenses for which a punitive discharge would be authorized under the UCMJ
 - Airmen and Guardians are subject to discharge for misconduct based on acts of aberrant sexual behavior or acts of sexual misconduct, which include offenses such as indecent viewing, visual recording or broadcasting, forcible pandering, and indecent exposure
 - Airmen and Guardians may be discharged for misconduct based on unauthorized absence continuing for one year or more
 - Airmen and Guardians are subject to discharge for misconduct based on acts that constitute unprofessional relationships between recruiters and potential recruits during the recruiting process or between students and faculty or staff in training schools or professional military education setting
- Drug Abuse (AFI 36-3208, paragraph 5.54): The illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug
 - This includes prescription medication, controlled substances in schedules I-V of the Schedule of Controlled Substances, 21 U.S.C. § 812. It also includes steroids and any intoxicating substance, other than alcohol, that is inhaled, injected, consumed, or introduced into the body in any manner for purposes of altering mood or function.
 - If the drug abuse involves the use of Cannabidiol (CBD), additional coordination with AFPC's legal office (AFPC/JA) and the AF/JA – Military Justice, Law and Policy Division (JAJM) may be required
 - Commanders must act promptly when information indicates drug abuse and initiate discharge or seek a waiver of discharge processing
 - A member found to have abused drugs will be discharged unless the member meets all seven of the retention criteria in AFI 36-3208, paragraph 5.54.4.2.1. The member has the burden of proving that he or she meets all seven retention criteria.
 - Members approved for discharge are not eligible for P&R
- Sexual Assault (AFI 36-3208, paragraph 5.55): Includes rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy, or attempts to commit these offenses. Sexual assault of a child includes rape of a child, sexual assault of a child, and sexual abuse of a child.
 - Commanders must act promptly when they have information indicating a member is subject to discharge for sexual assault or sexual assault of a child. They evaluate the specific circumstances of the offense, the member's record and potential for future service, and take prompt action to initiate discharge or seek waiver of discharge processing.
 - A member found to have committed sexual assault or sexual assault of a child will be discharged unless the member meets all six of the retention criteria in AFI 36-3208, paragraph 5.55.3.2.1. The member has the burden of proving he or she meets all six retention criteria.
 - Members approved for discharge are not eligible for P&R

- Characterization of Misconduct Discharge: Usually, the characterization for misconduct cases under AFI 36-3208, paragraphs 5.50, 5.51, 5.52, 5.54, and 5.55 should be under other than honorable conditions (UOTHC), but characterization may be honorable, general, or entry level separation in appropriate cases
 - The general court-martial convening authority (GCMCA), usually the numbered air force (NAF) commander, will approve separation for misconduct with a service characterization of honorable or UOTHC

Discharge in the Interest of National Security

- A member whose retention is clearly inconsistent with the interest of national security may be discharged
- Discharge may only be initiated after criteria in AFI 36-3208, paras. 5.57.1 and 5.57.2 have been met
- Discharge may be characterized as entry level, honorable, general, or UOTHC
- Members approved for discharge are not eligible for P&R

Failure in the Fitness Program

- A member who does not meet fitness standards as set out in AFMAN 36-2905, *Air Force Physical Fitness Program*, may be discharged when the failure is the result of a cause in the member's control
- The required medical examination prior to discharge must document that there is not a medical condition that would preclude the member from meeting fitness program standards
- Characterization of service is restricted to honorable if failure in the program is the sole reason for discharge
- Members approved for discharge should be considered for P&R

Joint Processing

- In some cases, it may be preferable to cite two or more reasons as the basis for the discharge recommendation if the member's record justifies more than one basis for discharge
 - If one of the reasons cited in the letter of notification as the basis for discharge entitled the member to a board hearing, then a hearing must be conducted unless waived by the member
 - For determining service characterization, apply the guidance for the basis for discharge that allows the most latitude in characterizing the member's service

REFERENCES

Schedules of Controlled Substances, 21 U.S.C. § 812

AFMAN 36-2905, *Air Force Physical Fitness Program* (11 December 2020)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2020-01, 1 July 2020

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (15 July 2019), incorporating Change 1, 4 December 2020

DUAL ACTION PROCESSING OF ADMINISTRATIVE AND MEDICAL DISCHARGES

“Dual action processing” refers to the simultaneous processing of an administrative and a medical discharge action. Commanders should not abandon pursuing an administrative discharge (particularly misconduct based administrative discharges) solely because a member is also undergoing processing for a medical discharge. Instead, commanders should press on with the administrative discharge while the medical discharge process is ongoing. Ultimately, if both discharges are warranted (administrative and medical), the general court-martial convening authority (GCMCA) or the Secretary of the Air Force Personnel Council (SAFPC) will choose which discharge to approve. This decision will be predicated in part on whether the member is an officer or enlisted and the member’s total active federal military service (TAFMS).

- Dual action processing is required when an Airman or Guardian subject to discharge is also eligible to apply for retirement (20 years or more active service) or is eligible for disability separation or disability retirement
 - Service Retirement Eligibility: Airmen and Guardians who are qualified for retirement may be permitted to retire in lieu of involuntary separation
 - Airmen and Guardians who are retirement eligible must be notified at the time discharge starts of the chance to apply for retirement
 - Disability Separation or Retirement: When an Airman or Guardian is eligible for, or has already entered into the Integrated Disability Evaluation System (IDES) and is also facing administrative discharge, refer to paragraphs 1.5 and 1.7 of AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation*, for processing guidelines. For Reserve members, refer to both AFI 36-3212 and paragraphs 4.24 and 4.25 of AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, for dual processing guidelines.
 - If the basis for administrative discharge cannot result in an Under Other Than Honorable Conditions (UOTHC) service characterization, both the administrative and medical discharge processes will be completed and SAFPC will choose which discharge to execute. See AFI 36-3212, para. 1.5.
 - If the basis for administrative discharge could result in UOTHC as a possible characterization, an initial decision authority will decide whether the member receives dual action processing. If allowed to receive dual action processing, both administrative and medical discharge processes will be completed and a final decision authority will choose which discharge will be executed. See AFI 36-3212, paragraph 1.7.
 - The initial and final decision authority is a member’s GCMCA for enlisted members with less than 16 years TAFMS by the time of discharge
 - For enlisted members with 16 years or more TAFMS (16 years of satisfactory participation for Air Force Reserve members) and all officers, the initial decision authority is Air Force Personnel Center Medical Standards Branch (AFPC/DP2NP) and the final decision authority is SAFPC.
 - If a member is granted dual action processing, both involuntary separations continue to process until both are ready to be executed. Only at that point may the final decision authority choose which discharge to execute. If a member is deemed medically fit for duty, the administrative separation may be executed because no dual action decision is needed.
 - Consult with the servicing legal office and the member’s Physical Evaluation Board Liaison Officer (PEBLO) when members are potentially eligible for dual action processing

REFERENCES

- AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2020-01, 1 July 2020
- AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011
- AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation* (15 July 2019), incorporating Change 1, 4 December 2020

PROCEDURE TO INVOLUNTARILY SEPARATE ACTIVE DUTY ENLISTED MEMBERS

Enlisted Department of the Air Force members may be involuntarily separated through two different processes: (1) notification procedures (applicable to E-4 and below with less than six years of service), and (2) board hearing procedures (applicable to E-5 and above, members with six or more years of service, or in any case when the commander is pursuing an Under Other Than Honorable Conditions (UOTHC) service characterization). Most cases are processed using notification procedures. Before initiating involuntary separation of a member, commanders must consult with the servicing staff judge advocate (SJA) and military personnel flight (MPF). Administrative separation of active duty Department of the Air Force enlisted members is governed by AFI 36-3208, *Administrative Separation of Airmen*. Involuntary separation of members of the Air National Guard (ANG) and Air Force Reserve is governed by the provisions of AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*.

Preprocessing Procedures

- The type of discharge processing a member is entitled to depends upon the rank of the member, the member's years of service, and the characterization of service pursued by the commander concerned
- Medical Examination: Before the member may be discharged, a comprehensive Separation Health and Physical Examination (SHPE) is required. The medical examination must document:
 - Any medical aspects pertaining to the reason for discharge; and
 - That the member is or is not medically qualified for worldwide service and separation
- Special Processing – Victims of Sexual Assault:
 - Airmen and Guardians who made an unrestricted report of sexual assault and is who are within one year of final disposition of his or her sexual assault allegation may request a general officer to review the circumstances of and grounds for any recommendation of his or her involuntary separation from the Department of the Air Force
 - The general officer review is conducted by the general court-martial convening authority (GCMCA) or, if the GCMCA is not a general officer, the first general officer in the member's chain of command
 - An enlisted member entitled to GCMCA review must be notified of this right in the separation notification memorandum
 - The member must submit his or her request for GCMCA review in writing. In this request, the member must affirmatively assert that he or she believes the pending discharge action was initiated in retaliation for making a report of sexual assault.
 - A member who submits a timely request to the GCMCA may not be separated until the GCMCA conducting the review concurs with the circumstances of and grounds for the involuntary separation
- Special Processing – Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI)
 - All enlisted Airmen and Guardians being recommended for involuntary separation who have deployed overseas in support of a contingency operation or were sexually assaulted during the previous 24 months and have been diagnosed with or reasonably assert post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) must receive a medical examination. The medical examination must assess whether the effects of PTSD or TBI constitute matters

in extenuation that relate to the basis for involuntary administrative separation. The medical examination is required if the member:

- Is being administratively separated under a characterization that is not either Honorable or Under Honorable Conditions (General);
 - Was deployed overseas to a contingency operation or sexually assaulted during the previous 24 months;
 - Has been diagnosed by a physician, clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse as experiencing PTSD or TBI, or reasonably alleges the influence of PTSD or TBI based on deployed service to a contingency operation or a sexual assault that occurred during the previous 24 months; **and**
 - Is not being separated under a sentence of court-martial, or other proceeding conducted pursuant to the UCMJ
- Members diagnosed with or reasonably asserting PTSD or TBI will not be separated until the result of the medical examination has been reviewed by appropriate authorities responsible for evaluating, reviewing, and approving the separation action, to include (if applicable): the initiating commander, administrative discharge board, convening authorities, separation authority, Air Force Review Board, and/or the Secretary of the Air Force (SecAF)
- Completion of Enlisted Performance Report (EPR)/Letter of Evaluation (LOE): An EPR or LOE must be generated for discharges based on parenthood, conditions that interfere with military service, unsatisfactory performance, or failure in the fitness program
 - The EPR must be completed if the Airman or Guardian has not had an EPR closing in the 90 days before the day discharge action starts

Notification Procedures

- If there is sufficient documentation and evidence supporting a basis for discharge, the commander serves a notification memorandum on the member. A sample of the notification memorandum is located in Figure 6.1 and 6.2 of AFI 36-3208.
- After receiving the notification memorandum, the member has three duty days to prepare a response (See AFI 36-3208, Figure 6.4)
- The commander considers the member's response, if any, and if the commander still recommends discharge, the commander signs a recommendation for discharge to the special court-martial convening authority (SPCMCA), who is usually the wing commander (See AFI 36-3208, Figure 6.5)
- The servicing SJA prepares a legal review of the package
- SPCMCA reviews the package and the SJA's legal review
 - If the SPCMCA is also the separation authority, the SPCMCA determines:
 - If there is a basis for discharge;
 - If the member should be discharged;
 - If the member should be discharged, how to characterize the member's service; and
 - If the member should be discharged, whether or not to offer Probation & Rehabilitation (P&R), if available

- If the SPCMCA is not the separation authority, the SPCMCA will forward the package to the GCMCA, who is usually the numbered air force (NAF) commander, with a recommendation concerning the above four questions

Board Entitlement

- A member recommended for discharge must be offered a hearing by an administrative discharge board if one of the following applies:
 - The member is a non-commissioned officer at the time discharge processing starts
 - The member has six years or more total active and inactive service, including delayed enlistment time, at the time discharge processing starts
 - The commander recommends a UOTHC characterization
 - Discharge in the interest of national security is recommended. Ensure appropriate clearance to proceed.

Board Hearing Procedures

- After receiving the notification memorandum (See AFI 36-3208, Figure 6.6), the member has seven duty days to:
 - Request a board hearing or unconditionally waive his or her right to a board hearing (See AFI 36-3208, Figure 6.8); or
 - Waive the board hearing contingent upon receiving a specific type of discharge, which is called a conditional waiver (See AFI 36-3208, Figure 6.9)
- The commander considers the member's response, if any, and if the commander still recommends discharge, he or she signs a recommendation for discharge to the SPCMCA (See AFI 36-3208, Figure 6.5)
- In cases where the member requests a board hearing, the SPCMCA reviews the recommendation for discharge and either sends the file back to the unit for further action (normally to withdraw the action or reinstate the action using different grounds or evidence) or convenes a discharge board
- The administrative board convenes, considers all the evidence, and makes:
 - A separate finding of fact on each allegation set out in the notification memorandum. The board's finding of fact will determine whether a basis for discharge exists.
 - A recommendation to discharge or retain the member
 - A recommended characterization of service if the board recommends discharge
 - A recommendation concerning P&R (if member is eligible) if the board recommends discharge
- The servicing SJA prepares a legal review of the package and forwards the package to the SPCMCA
- The SPCMCA takes final action if referral to the GCMCA is not required or forwards the package to the GCMCA if referral to the GCMCA is required
- Lengthy Service Consideration: Members with more than 16 but less than 20 years of service are entitled to special probation consideration upon request and may not be separated before forwarding to the Air Force Personnel Center (AFPC) for review

- Retirement in Lieu of Discharge: Members with more than 20 years of service are entitled to special probation consideration upon request and may not be separated before forwarding to AFPC for review

REFERENCES

Members Diagnosed With or Reasonably Asserting Post-Traumatic Stress Disorder or Traumatic Brain Injury: Medical Examination Required Before Administrative Separation, 10 U.S.C. § 1177

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2020-01, 1 July 2020

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (15 July 2019), incorporating Change 1, 4 December 2020

DAFM 48-123, *Medical Examinations and Standards* (8 December 2020)

AFMAN 51-507, *Enlisted Discharge Boards and Boards of Officers* (24 January 2019), including AFMAN51-507_AFGM2020-01, 15 July 2020

PROBATION AND REHABILITATION (P&R) FOR ACTIVE DUTY ENLISTED MEMBERS

The Department of the Air Force program of probation and rehabilitation (P&R) allows the service to retain a trained resource while allowing enlisted members another opportunity to complete their service honorably. P&R is a conditional suspension of an approved administrative discharge for cause. In deserving cases, it allows a member to prove that he or she is able to meet Department of the Air Force standards. Administrative separation of active duty Department of the Air Force enlisted members, the focus of the below discussion, is governed by AFI 36-3208, *Administrative Separation of Airmen*. Involuntary separation of members of the Air National Guard (ANG) and Air Force Reserve is governed by the provisions of AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*.

P&R Considerations

- Only the discharge authority can suspend the execution of a discharge for P&R
- Members who have completed at least 16 but less than 20 years of active service are entitled to special consideration upon their request and their cases are forwarded to the Air Force Personnel Center (AFPC) for review concerning probation
- P&R is appropriate for members:
 - Who demonstrate a potential to serve satisfactorily
 - Who have the capacity to be rehabilitated for continued military service or completion of the current enlistment
 - Whose retention on a probationary status is consistent with the maintenance of good order and discipline

Eligibility Requirements

- Members are **NOT** eligible for P&R if the reason for discharge is one of the following:
 - Failure to comply with preventive medicine counseling (safe sex order) by a member with human immunodeficiency virus (HIV)
 - Fraudulent entry into the service
 - Entry level performance or conduct
 - In the interest of national security
 - Drug abuse
 - In lieu of trial by court-martial
 - Sexual assault
- Members must be considered for P&R if the reason for discharge is unsatisfactory performance or misconduct (except for reasons stated above)
 - The case file must show the initiating commander, board members if a hearing is involved, and separation authority considered P&R
 - If the initiating commander does not recommend P&R, he or she must give the reason for not recommending P&R
 - If the initiating commander recommended P&R and the separation authority disapproved that recommendation, the separation authority must state the reason for his/her decision

P&R Procedures

- Suspending the execution of an approved discharge is contingent on successful completion of rehabilitation
 - The separation authority sets a specific period of rehabilitation, which is not less than six months or not more than 12 months
 - The probationary period is usually served in the current unit of assignment, but reassignment to another local unit or within the major command (MAJCOM) may be authorized if warranted by the circumstances of the case
- If the decision is made to offer a member P&R, the commander must:
 - Give the member information about the P&R program (AFI 36-3208, Figure 7.2)
 - Counsel the member, emphasizing points listed in AFI 36-3208, paragraph 7.7.2
 - Find out whether the member has enough retainability to complete P&R, and if not, try to get a voluntary request for extension of enlistment for the minimum time required
 - Require members who accept P&R to sign statements of understanding and acceptance of the terms of probation
 - Ensure the terms of probation are set out in a letter from the separation authority and countersign the letter (AFI 36-3208, Figure 7.1)
 - Require members who refuse P&R or fail to satisfy the retention requirements to sign a statement acknowledging understanding of the rehabilitation privilege, giving the date the commander counseled the member, and acknowledging understanding of the effects of refusal to accept P&R

What Happens During P&R

- The commander is the primary judge of the member's performance
 - Commanders are not required to set up a special rehabilitation program because the member is expected to perform duties appropriate to his or her grade, skill level, and experience
 - An enlisted performance report (EPR) is prepared every 90 days
 - Promotion consideration is according to AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs*
 - Members are not selected for formal training while in P&R
 - A commander usually should not place a member in P&R on the control roster, and the commander should consider removing the member from the control roster if the member is on it when placed in P&R
 - Reenlistment consideration is according to AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*

Completing P&R

- If a member successfully completes P&R:
 - The approved discharge is automatically and permanently canceled on the date the suspension expires
 - Separation at expiration of term of service (ETS) will result in an honorable service characterization

- Future failure to maintain standards may be the basis for new discharge proceedings
- Eligibility for reenlistment will be according to AFI 36-2606 and none of the reasons for recommending discharge that existed before P&R began may be used as a basis for denial of reenlistment

Other Command Options

- Commanders have other options during P&R, including:
 - Canceling the probation in whole or in part where member's good conduct clearly shows goals of P&R have been met
 - Extending the probationary period where member has made progress but the commander is not sure rehabilitation is complete. The original probationary period and the extension together must not exceed one year, and the member must consent to the extension.

Terminating P&R

- If a decision is made to initiate vacation (termination) of the P&R, the commander notifies the member by a letter, which gives:
 - The reason for the action
 - The name, address, and phone number of military legal counsel (often the area defense counsel (ADC))
 - Instruction that the member may secure civilian counsel at his own expense
 - Instruction to reply within seven workdays (rebuttal or waiver of right to rebut)

REFERENCES

- AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs* (12 December 2014), incorporating through Change 2, 14 October 2016, including AFI36-2502_AFGM2020-01, 23 October 2020
- AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force* (20 September 2019), incorporating Change 1, 27 January 2021
- AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2020-01, 1 July 2020
- AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

OFFICER SEPARATIONS – ACTIVE DUTY

Separation of Department of the Air Force officers operate similarly to active duty enlisted separations. However, certain key differences exist. Most of the differences revolve around definitions, terminology, and authorities for officer separations. Unlike enlisted separations, the Secretary of the Air Force (SecAF) is the approval authority for all “for cause” commissioned officer administrative discharges. The below discussion is applicable to active duty Department of the Air Force officers. Separation of members of the Air National Guard (ANG) and Air Force Reserve is governed by the provisions of AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*.

Definitions

- Non-probationary Officer:

- Regular officer with six or more years of active commissioned service as determined by the officer’s total active federal commissioned service date; or
- Reserve officer with five or more years of commissioned service (inactive or active) as determined by the officer’s total federal commissioned service date

- Probationary Officer:

- Regular officer who has completed less than six years of active commissioned service as determined by the officer’s total active federal commissioned service date; or
- Reserve officer who has completed less than five years of commissioned service (inactive or active) as determined by the officer’s total federal commissioned service date

Voluntary Separation

- Officers may apply for voluntary separation prior to expiration of term of service under AFI 36-3207, *Separating Commissioned Officers*, Chapter 2, for a variety of reasons, which include:
 - Completion of active duty service commitment (ADSC)
 - Hardship
 - Pregnancy
 - Conscientious objector status
 - Medal of Honor recipient
 - Other miscellaneous reasons
- Voluntary separations are subject to approval by SecAF. SecAF or designee may disapprove an application if, among other reasons, the officer:
 - Has had charges preferred or is under investigation
 - Remains absent without leave or absent in the hands of civil authorities
 - Defaulted with respect to public property or funds
 - Has been sentenced by a court-martial to dismissal
 - Is being considered for involuntary administrative discharge proceedings
 - Submits an application during war, when war is imminent, or during an emergency declared by the President or Congress

- Has an ADSC for advanced educational assistance, government-funded education or training programs, special pay, or bonus pay (restriction applies even when the reason for separation is pregnancy)

Involuntary Separations – Not “For Cause”

- Officers may be separated involuntarily under AFI 36-3207, Chapter 3, Section 3B, for various reasons that are not for cause
- Many involuntary separations are required by law (e.g., reserve officers who reach age limit, those non-selected for promotion, and officers who have reached maximum years of commissioned service or service in grade)
- Other involuntary separations include loss of ecclesiastical endorsement, failure to complete or pass medical training, nursing examinations, or nursing intern programs, and officers in health care fields who do not have required licenses
- Involuntary separations that are not for cause will normally be characterized as honorable

Involuntary Separations – “For Cause”

- Grounds for discharge for cause are found in AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, Chapter 2 (substandard performance of duty) and Chapter 3 (misconduct, moral or professional dereliction, or in the interest of national security)
- Substandard Performance of Duty:
 - Only an honorable or general (under honorable conditions) characterization for active duty for these categories subjecting an officer to separation:
 - Failure to show acceptable qualities of leadership
 - Failure to achieve acceptable standards of proficiency required of an officer in his or her grade
 - Failure to discharge duties equal to his or her grade and experience
 - Substandard performance of duty resulting in an unacceptable record of effectiveness
 - A record of marginal service over an extended time as shown by performance reports covering two or more jobs and prepared by at least two different supervisors
 - Mental disorders that interfere with the officer’s performance of duty and do not fall within the purview of the medical disability process
 - Apathy or defective attitude
 - Failure to conform to prescribed standards of dress, physical fitness, or personal appearance. For cause separation under AFI 36-3206, Chapter 3, is appropriate if failure is deliberate.
 - Inability to perform duties because of family care responsibilities
 - Unsatisfactory progress or failure in, or disenrollment from, an active status skills-awarding education or training program
 - Before discharging an officer under this chapter, there should be a documented history of problems and documented efforts to correct the officer’s conduct
 - If an officer is being separated for reasons under this chapter and received education assistance, special pay, or bonus money, the officer is subject to recoupment

- Misconduct, Moral or Professional Dereliction, or in the Interest of National Security:
 - When officers engage in some form of misconduct, discharge under this chapter is often the most appropriate basis
 - Although not necessarily considered misconduct, discharges for fear of flying for rated officers fall under this chapter
 - Some other specific grounds for discharge, besides fear of flying for rated officers, include:
 - Having human immunodeficiency virus (HIV) and not complying with lawfully ordered preventive medicine procedures (i.e., safe sex order)
 - Failure to meet financial obligations
 - Intentional or discreditable mismanagement of personal affairs
 - Drug abuse, which is defined as the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug
 - Serious or recurring misconduct punishable by civilian or military authorities
 - Intentional neglect or intentional failure to either perform assigned duties or complete required training
 - Misconduct resulting in the loss of professional status necessary to perform duties
 - Intentionally misrepresenting or omitting facts concerning official matters
 - Sexual assault or sexual assault of a child
 - Sexual perversion, including aberrant sexual behavior, acts of sexual misconduct, or any indecent viewing, visual recording or broadcasting, forcible pandering, or indecent exposure
 - Sexual disorders, including exhibitionism, voyeurism, and other disorders as defined in the Diagnostic and Statistical Manual of Mental Disorders which do not qualify for processing within the medical disability system
 - Retention is not clearly consistent with interests of national security
 - Sentence by a court-martial to a period of confinement for more than six months and not sentenced to a dismissal
 - Unprofessional relationship by person serving in special position of trust as recruiter, faculty or staff
 - The service of officers separated under this chapter may be characterized as honorable, general (under honorable conditions), or under other than honorable conditions (UOTHC)
 - If an officer is being separated for reasons under this chapter and received education assistance, special pay, or bonus money, the officer is subject to recoupment

Discharge Procedures

- Unit commander must evaluate the information and consult with the servicing staff judge advocate (SJA)
- If appropriate, the unit commander recommends discharge to the show cause authority (SCA), who is usually the wing commander if he or she is a general officer, or the general court-martial convening authority (GCMCA), usually the numbered air force (NAF) commander, for wings not commanded by a general officer

- If appropriate, the SCA initiates discharge action by signing a letter to the officer notifying him/her of the discharge action
- Within 10 calendar days of receipt of the letter of notification, the officer submits evidence in response, applies for voluntary retirement (if eligible), tenders a resignation, or requests a delay to respond
- If the SCA determines no action is warranted, the action is terminated
- If the SCA determines discharge action is warranted, the type of processing that occurs depends on the officer's status and the characterization recommended
 - Not Board Entitled: If the officer is probationary, and the case does not involve a recommendation for a UOTHC service characterization, the SCA notifies the officer that the case will be reviewed by the Air Force Personnel Board (AFPB). The officer is not entitled to appear in front of or present witness testimony to the AFPB.
 - Board Entitled: If the officer is non-probationary, or the officer is probationary and a UOTHC discharge is recommended, then the SCA notifies the officer that the officer will be required to show cause for retention before a board of inquiry (BOI). The officer is entitled to appear in front of and present witness testimony to the BOI.
- SecAF is the final approval authority for separations initiated under AFI 36-3206

Resignations in Lieu of Further Administrative Discharge Proceedings

- When the SCA notifies an officer to show cause for retention, an officer may:
 - Submit a resignation; or
 - Submit a resignation to enlist and retire if eligible to apply for retirement in enlisted status
- These options should not be confused with resignations for the good of the service, which an officer may submit when facing a court-martial for alleged criminal conduct (See AFI 36-3207, Chapter 2, Section 2C)
- Officer may be entitled to separation pay
- SecAF is the approval authority

Special Processing Procedures

- Special processing is required for officers who have made an unrestricted report of a sexual assault
 - An officer who receives notification of a show cause action under Chapter 2 or Chapter 3 of AFI 36-3206 and who is within one year of final disposition of his or her unrestricted sexual assault allegation as of the date of show cause notification must be advised of the right to request review by the SCA if the officer believes the commander's recommendation for involuntary separation was initiated in retaliation for having made an unrestricted report of a sexual assault
- Special processing is required for officers being discharged for personality disorder or other mental disorder not constituting a physical disability when that officer has served or is currently serving in an imminent danger pay area or those that have filed an unrestricted report of sexual assault
- Pre-separation medical examinations are required for officers deployed in support of a contingency operation or Airmen and Guardians who have been sexually assaulted

REFERENCES

Reserve Officers: Limitation on Involuntary Separation, 10 U.S.C. § 12683

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), incorporating through Change 7, 2 July 2013, including AFI36-3206_AFGM2020-01, 18 June 2020

AFI 36-3207, *Separating Commissioned Officers* (1 July 2020), incorporating through Change 6, 18 October 2011, including AFI36-3207_AFGM2020-01, 1 July 2020

AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (15 July 2019), incorporating Change 1, 4 December 2020

DAFM 48-123, *Medical Examinations and Standards* (8 December 2020)

AFMAN 51-507, *Enlisted Discharge Boards and Boards of Officers* (24 January 2019), including AFMAN51-507_AFGM2020-01, 15 July 2020

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

ADMINISTRATIVE SEPARATION OF AIR NATIONAL GUARD AND AIR FORCE RESERVE MEMBERS

Air Force Instruction (AFI) 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, applies to both officer and enlisted members of the Air Reserve Component (ARC) not serving on extended active duty (EAD) with the Regular Air Force (RegAF). Tables 2.1 and 3.1 of AFI 36-3209 provides a comprehensive list of permissible reasons for officer and enlisted separations. Discharge actions for Active Guard/Reserve (AGR) personnel should be processed in accordance with AFI 36-3208, *Administrative Separation of Airmen*.

General Considerations

- Processing of discharge actions vary depending on whether the member is a Category A (CAT A) Reservist, Category B (CAT B) Reservist, or an Air National Guard (ANG) member. Commanders should consult the servicing staff judge advocate (SJA) for questions, deviations, and state-specific guidance.
- CAT A (Reserve Unit):
 - Commanders should consult with their servicing legal office prior to initiating involuntary discharge actions
 - To initiate discharge action, the initiating commander serves the member with a written letter of notification (LON) containing the reasons, including the circumstances upon which the action is based, for discharge and the least favorable type of separation authorized. A sample of this notification memorandum is contained in Attachment 3 and 6 of AFI 36-3209. Additional guidance for preparing and processing discharge actions can be found in the Air Reserve Personnel Center (ARPC)'s Discharge Guide located on myPers.
 - Once the SJA approves the legal sufficiency of the LON, the unit commander serves the LON and all supporting documentation upon the Respondent. The Respondent should acknowledge receipt and be provided 15 days to respond and submit rebuttal evidence.
 - In-person service of the LON is preferred. However, if the member is not served in person, the LON should be sent via registered or certified mail, return receipt requested, to the member's address listed in the Military Personnel Data System (MilPDS). If other attempts at service prove unsuccessful, the unit commander may send the LON to the member by first class mail.
 - If notification attempts are not successful, determine whether there is another address available. All attempts to serve the LON via mail should be documented.
 - For enlisted members who are **NOT** board entitled, do not have lengthy service consideration, and are not retirement eligible, the unit commander should forward the complete discharge package including matters submitted by the member, through the servicing legal office to the wing commander as discharge authority
 - For enlisted members who are board entitled, have lengthy service consideration, or are retirement eligible, the unit commander should forward the complete discharge package including matters submitted by the member through command channels to the discharge authority to convene the Board
 - Air Force Reserve Command (AFRC) can convene discharge boards for Reserve personnel, but numbered Air Forces (NAFs) and Wings are empowered to hold them as well

- Secretary of the Air Force (SecAF) action is required for all discharges characterized as Under Other than Honorable Conditions (UOTHC)
- Involuntary discharges for officers will be initiated by the Show Cause Authority. SecAF is the final approval authority for involuntary separations for officers.
- If involuntary discharge is pending and the commander does not want the member to continue participating, the member should be placed in “No Pay, No Points” status
- Unit commanders may drop, from the rolls of the Air Force Reserve, any member who has been found guilty by civil authorities of any offense and sentenced to confinement in a federal or state penitentiary or correctional institution or a member who has been sentenced by court martial to confinement for more than six months without a punitive discharge. SecAF approval is required.
- Service characterizations for Reserve discharges are substantially similar to those for RegAF members. When the basis for the discharge is off-duty conduct in the civilian community, commanders should be aware that a military nexus is required to characterize the service of a Reservist as either Under Honorable Conditions (General) or UOTHC.
 - Conduct in the civilian community by a member who was not on active duty or active duty for training (ADT) may be used to characterize his or her service as General only if the conduct has an adverse impact on the effectiveness of the Department of the Air Force, including military morale and efficiency
 - Conduct in the civilian community by a member not on active duty or ADT may be used to characterize his or her service as UOTHC only if the conduct directly affects the performance of military duties
- Many of the requirements and procedures outlined above for CAT A Reservists likewise applies to ANG members
- CAT B Individual Mobilization Augmentees (IMAs):
 - Discharge of Individual Mobilization Augmentees (IMAs) are processed through the Headquarters Readiness and Integration Organization (HQ RIO). HQ RIO is AFRC's agency with shared administrative control (ADCON) of an IMA with the IMA's active duty unit.
 - HQ RIO is comprised of a headquarters and seven detachments with administrative oversight responsibility for IMAs. The RIO detachment commander, an IMA, is assigned to initiate the discharge process in coordination with HQ RIO and ARPC's legal office (ARPC/JA).
 - An IMA's active duty unit commander should coordinate with the HQ RIO detachment commander to discuss the IMA's case, gather evidence, and recommend discharge. The evidence is then provided to ARPC/JA for legal sufficiency review and analysis.
 - If ARPC/JA finds the case file lacks sufficient documentation, ARPC/JA will advise the RIO detachment and unit commanders on what additional supporting documentation is needed before processing can start. If sufficient documentation is provided, ARPC/JA develops the notification package and requests a formal memo from the RIO detachment commander, with indorsement by HQ RIO/CC. The formal memo must include a recommendation that HQ ARPC/CC consider discharge action or retention for certain discharge bases.
 - HQ ARPC/CC is the Show Cause Authority for officers
 - HQ ARPC/CC is as the Discharge Authority for enlisted members

- HQ ARPC/JA provides notification of the discharge recommendation or show cause action on the member on behalf of the initiating commander
- If a board eligible IMA member requests to have their case heard by a Board of Inquiry (BOI), then HQ ARPC/CC convenes a board. Discharge boards and BOIs will be convened in coordination with the wing legal office which supports the IMA's unit of assignment. The board will typically be hosted and staffed by the wing legal office but location of witnesses may cause the proceedings to be held at alternate locations.
- For notification only IMA discharge cases, HQ ARPC/CC makes a recommendation to the Secretary of the Air Force Personnel Council (SAFPC) regarding discharge for officers and enlisted with lengthy service considerations
- For enlisted members without lengthy service considerations, HQ ARPC/CC makes the final discharge decision. However, recommendations for UOTHC service characterizations for enlisted members require forwarding to SAFPC.
- Individual Ready Reserve (IRR)
 - Members in certain specialty programs (e.g., Health Professions Scholarship Program (HPSP) and ROTC graduates) maintain status in the Individual Ready Reserve (IRR) pending entry onto active duty (EAD). Discharge actions for such members are processed by ARPC/JA.
 - HQ ARPC/CC is the Discharge Authority to either separate or recommend to SAFPC the separation of members of the IRR. For cases involving potential recoupment of educational assistance or other aid, SAFPC reviews the case file, makes a decision on discharge and whether recoupment is appropriate, and issues the instrument effectuating the discharge of these officers. If the member is discharged, his or her separation is processed by ARPC. These members are usually not board eligible.
- Board Entitlements: The following reservists are entitled to present their cases before an administrative discharge board:
 - *Enlisted:*
 - If the recommended characterization of service is UOTHC
 - If the member is a non-commissioned officer
 - If the member has six or more years of satisfactory service for retirement
 - *Officers:*
 - A non-probationary officer who has completed five or more years of service as a commissioned officer in any of the armed forces (as determined from the total federal commissioned service date)
 - A probationary officer who has completed fewer than five years of service as a commissioned officer in any of the armed forces (as determined from the total federal commissioned service date) when the recommended characterization of service contained in the letter of notification is UOTHC

REFERENCES

Reserve Officers: Limitation on Involuntary Separation, 10 U.S.C. § 12683

DoDI 1332.30, *Commissioned Officer Administrative Separations* (11 May 2018), incorporating through Change 2, 22 May 2020

DoDI 1332.14, *Enlisted Administrative Separations* (27 January 2014), incorporating through Change 5, 12 June 2020

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2020-01, 1 July 2020

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

AFMAN 51-507, *Enlisted Discharge Boards and Boards of Officers* (24 January 2019), including AFMAN51-507_AFGM2020-01, 15 July 2020

Delegations of AFRC/CC Authority Memorandum (7 January 2021) (or current version)

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INSTALLATION JURISDICTION

Installation jurisdiction refers to the type of legal authority exercised by the Department of the Air Force over an installation. There are four main types of jurisdiction (arranged from greatest Department of the Air Force authority to least): (1) exclusive federal jurisdiction; (2) concurrent federal jurisdiction; (3) partial federal jurisdiction; and (4) proprietary jurisdiction. Depending on your installation, more than one type of jurisdiction may apply. Always check with the staff judge advocate (SJA) to verify the type of jurisdiction existing on your installation.

Title

- Title, in relation to a military installation, is virtually the same as in a private real estate transaction. Title simply means legal ownership — the legal right to the use and possession of a designated piece of property.
- In most cases, the Department of the Air Force has title to the property on which its installations are located. However, some installations sit on leased property or have portions of the base sitting on leased property.
- The installation's civil engineer (CE) squadron maintains the deed or lease to the installation. Questions concerning title to the installation's real property should be referred to the servicing SJA

Jurisdiction

- The concept of jurisdiction is separate and distinct from that of title
- Jurisdiction includes the right to legislate (i.e., implement laws, rules, and regulations) and to enforce those laws. Having title does not necessarily include legislative jurisdiction.

Sources of Legislative Jurisdiction

- Article I, Section 8, Clause 17, of the United States Constitution confers upon Congress the power to exercise legislative jurisdiction over federal property. The government can acquire the right to exercise legislative jurisdiction in three ways.
 - Purchase and Consent: The federal government purchases the property, and the state legislature consents to giving the federal government jurisdiction
 - Cession: After the federal government acquires title to property, the state may cede jurisdiction, in whole or in part, to the federal government. The federal government can later retrocede jurisdiction back to the state. 10 U.S.C. § 2683. Prior to 1940, it was presumed that jurisdiction was ceded at the time the government acquired the property. Since 1940, however, there must be an affirmative acceptance of jurisdiction before the federal government will have legislative jurisdiction. 40 U.S.C. § 3112. Check the deed to determine when the federal government acquired the property.
 - Reservation: At the time the federal government ceded property to establish a state, particularly in the western United States, it reserved some of the land as federal property. In these cases, the federal government retained legislative jurisdiction over the property it reserved. Again, check the deed.

Types of Legislative Jurisdiction

- The inquiry does not stop with determining if the federal government has legislative jurisdiction. It is also necessary to determine what type of jurisdiction it has. There are four types of legislative jurisdiction.
 - Exclusive Jurisdiction: As the term implies, the state grants all of its authority to the federal government in an area and this type of jurisdiction gives the federal government sole authority to legislate in that area. Unless exclusive jurisdiction was reserved at the time land was granted to the state, it is necessary to go back to the state for exclusive jurisdiction. The state may have elected to reserve some authority, e.g., authority to serve civil and criminal process on the property. If the state failed to reserve such authority, it is waived. For some years now, it has been federal policy not to acquire exclusive jurisdiction. While at first blush this may seem odd, there are legitimate reasons for the policy. For instance, state and local authorities may be better able to deal with particular situations (e.g., child welfare services, domestic relations matters, etc.) than the federal government.
 - Concurrent Jurisdiction: Both the state and federal governments retain all their legislative authority. In other words, the state grants the federal government legislative jurisdiction over an area but reserved to itself the right to exercise the same authority at the same time, as long as the state does not interfere with the federal mission. In the event of conflict, the federal government prevails under the Supremacy Clause of the Constitution.
 - Partial Jurisdiction: Both the state and federal government have some legislative authority, but neither one has absolute power. For instance, the state may have reserved the authority to impose and collect taxes, or it may have ceded only criminal jurisdiction over the property. Again, federal supremacy applies in the event of a conflict.
 - Proprietary Jurisdiction: In this case, the federal government has acquired some right or title to an area in a state but has not obtained any of the state's authority to legislate over the area. The United States is simply a tenant with virtually no legislative authority. The federal government maintains immunity and supremacy for inherently governmental functions. The only federal laws that apply are those that do not rely upon federal jurisdiction (e.g., espionage, bank robbery, tax fraud, counterfeiting, etc.). However, the installation commander can still exclude civilians from the area pursuant to the commander's inherent authority.

REFERENCES

U.S. Const. Art. I, § 8, cl. 17

U.S. Const. Art. VI, cl. 2

Relinquishment of Legislative Jurisdiction, 10 U.S.C. § 2683

Federal Jurisdiction, 40 U.S.C. § 3112

Greer v. Spock, 424 U.S. 828 (1976)

AFI 32-9001, *Acquisition of Real Property* (28 September 2017)

AFI 32-9002, *Management of Real Property* (18 December 2020)

FEDERAL MAGISTRATE COURT PROGRAM

The federal magistrate program provides a means of enforcing discipline on base with respect to civilian criminal misconduct. The availability of the program depends on the location and jurisdiction of the base, the type and location of the offense, and the status of the offender.

How Magistrate Court Works

- Federal magistrate court is an alternative to prosecution in federal district court. Magistrate court generally provides a more expeditious and cost-effective forum than federal district court for minor civilian criminal misconduct (misdemeanor or petty offenses).
- Active duty military members and Air Force Reserve (AFR) and Air National Guard (ANG) service members who commit misconduct while on Title 10 orders shall **NOT** be prosecuted for criminal offenses in federal magistrate court
- Federal magistrate judges normally try misdemeanor offenses (offenses for which the authorized penalty does not exceed one year of imprisonment)
 - More serious criminal misconduct by civilians that occurs on a federal installation can be referred to the United States Attorney's Office, or, depending on jurisdiction, to state or local prosecutors
- Department of the Air Force judge advocates, when designated by the United States Attorney for the area of the base to act as Special Assistant United States Attorneys (SAUSAs), may represent the United States in federal magistrate court
- Where an installation magistrate court program is established, the installation commander should execute a memorandum of understanding (MOU) with the U.S. Attorney covering responsibilities and procedures for trials in federal magistrate court

Federal Magistrate Program Jurisdiction

- Criminal actions committed by civilians on a military installation may be handled in federal court or state court, depending upon the jurisdictional status of the installation and whether the alleged crime violated state or federal law
 - Federal Statutes without Territorial Jurisdiction Requirements: Prosecuted in federal court regardless of the installations jurisdictional status, e.g., counterfeiting, espionage, sabotage, bribery of federal officers
 - Federal Statutes with Territorial Jurisdiction Requirements: May be prosecuted in federal court if the installation where the crime occurs has appropriate jurisdiction, e.g., exclusive or, in most cases, concurrent jurisdiction
 - If the federal government has only proprietary jurisdiction, federal statutes that rely on territorial jurisdiction may not be enforced in federal court. Such offenses may be prosecuted only in state court.
 - If the federal government has exclusive jurisdiction, the state may not prosecute offenses committed on the installation. Federal courts provide the only remedy.
 - State Statutes: On installations within the United States where the federal government has concurrent jurisdiction with the state, generally, state law crimes will be prosecuted in state court. However, most state law violations can be handled in federal court under the Assimilative Crimes Act, 18 U.S.C. § 13.

--- The Assimilative Crimes Act makes violating a state statute on an installation with exclusive jurisdiction a federal offense and allows prosecution of state crimes

---- This is available where the conduct does not otherwise violate a federal statute

- State vehicular and pedestrian traffic laws are expressly adopted and made applicable on military installations having concurrent or exclusive federal jurisdiction under the provisions of 18 U.S.C. § 13. In those states where violations of traffic laws are not considered criminal offenses and cannot be assimilated, DoDD 5525.4, *Enforcement of State Traffic Laws on DoD Installations*, adopts the vehicular and traffic laws of such states and makes these laws applicable to military installations having concurrent or exclusive federal jurisdiction.

REFERENCES

Assimilative Crimes Act, 18 U.S.C. § 13

32 C.F.R. § 634.25, *Installation Traffic Codes* (2012)

DoDD 5525.4, *Enforcement of the State Traffic Laws on DoD Installations* (2 November 1981), incorporating Change 3, 30 September 2020

AFI 36-703, *Civilian Conduct and Responsibility* (30 August 2018)

AFI 51-206, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (31 August 2018)

COURT-MARTIAL JURISDICTION UNDER THE UCMJ

The Uniform Code of Military Justice (UCMJ) applies at all times and at all places to active duty military members, as well as to members of the Air Force Reserve in activated status and members of the Air National Guard (ANG) in “Title 10” federal status. Court-martial jurisdiction rests upon two primary considerations: (1) commission of an offense under the UCMJ and (2) military status of the person who committed the offense at the time the offense was committed.

Types of Jurisdiction

- Military Offenses: Courts-martial have exclusive power to hear and decide “purely military offenses”
- Nonmilitary Offenses: Crimes that violate both the UCMJ and local criminal law may be tried by a court-martial, a civilian court, or both
 - Double Jeopardy for court-martial and federal court prosecution of same misconduct
 - A military member may **NOT** be tried for the same misconduct by both a court-martial and another federal court because doing so would constitute “double jeopardy” (the same sovereign (i.e., the federal government) prosecuting the accused twice for the same misconduct)
 - No Double Jeopardy for court-martial and state/foreign court prosecution of same misconduct
 - A military member **MAY** be tried for the same misconduct by both a court-martial and state court. However, if a military member was tried by a state court and jeopardy attached, regardless of the outcome, as a matter of policy, the approval of the Secretary of the Air Force (SecAF) is required before proceeding with a court-martial. If the case was dismissed before jeopardy attached, SecAF approval is not necessary.
 - Host nation treaties and status of forces agreements (SOFAs) govern exercise of jurisdiction over military members overseas

Jurisdiction Over the Offense

- Courts-martial may try any offense under the UCMJ, and, in general courts-martial, the law of war

Jurisdiction Over the Person

- General Rule: Article 3(a), UCMJ, authorizes court-martial jurisdiction in all cases in which the service member was subject to the UCMJ at the time of the offense and is subject to the UCMJ at the time of trial. Article 2, UCMJ, lists classes of persons who are subject to the UCMJ.

Air Force Reserve

- Articles 2(a)(1) and 2(a)(3), UCMJ, extend court-martial jurisdiction over reservists whenever they are in Title 10 status (i.e., inactive duty training (IDT), active duty (AD), or annual tour (AT))
- Article 2(d), UCMJ, authorizes a member of the Reserves to be ordered to active duty for nonjudicial punishment (NJP), Article 32 preliminary hearing, and trial by court-martial
 - The Department of the Air Force has placed certain restrictions on involuntary recall of reserve members
 - When determining whether a commander has UCMJ jurisdiction over the member, the commander must determine the (1) military status of the service member at time of the offense and (2) military status of the service member at the time of court-martial

Air National Guard (ANG)

- A member of the ANG is subject to UCMJ court-martial jurisdiction only when in federal service
 - ANG members are only subject to UCMJ court-martial jurisdiction when they are in a federal duty status often referred to as “Title 10” status
 - When ANG members are performing state duty (state active duty or Title 32) they are subject to their state codes of military justice
 - It is very important to coordinate with the local staff judge advocate (SJA) when addressing ANG military justice matters to ensure jurisdiction over the person

Retirees

- Court-martial jurisdiction continues over retired Regular Air Force (RegAF) personnel entitled to military pay
- Retired members should not be court-martialed unless their conduct clearly links them with the military or is adverse to a significant military interest of the United States
- Commanders should not prefer charges against retired members without SecAF approval unless the statute of limitations is about to run out. The SJA will coordinate approval, as needed, to recall a retired member for court-martial.

Termination of Jurisdiction

- General Rule: A valid discharge from military service terminates jurisdiction. For a valid discharge to exist, there must be:
 - Delivery of a valid discharge certificate;
 - A final accounting of pay; and
 - Completion of the clearing process required by appropriate service instructions
- Exceptions:
 - The member was subject to the UCMJ at the time of the offense and is subject to the UCMJ at the time of trial
 - A fraudulently obtained discharge does not terminate military jurisdiction
 - A Department of the Air Force reserve member is not, by virtue of the termination of a period of active duty or inactive-duty training, “shielded” from jurisdiction for an offense committed during such period of active duty or inactive-duty training

Statute of Limitations

- General Rule – Nonjudicial Punishment (NJP): Imposition of NJP within two years of offense
- General Rule – Court-Martial: Preferral of charges within five years of offense
- Exception: There is no statute of limitation for a person charged with absence without leave or missing movement in time of war, murder, rape, sexual assault, rape or sexual assault of a child, or any offense punishable by death

REFERENCES

U.S. Const. Amend. V UCMJ arts. 2, 3, and 43

Reserve Components Generally, 10 U.S.C. § 12301

Army and Air National Guard of the United States: Status, 10 U.S.C. § 12401

Solorio v. United States, 483 U.S. 435 (1987)

Rules for Courts-Martial 201-204 (2019)

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_ DAFGM2021-01, 5 January 2021

A COMMANDER'S GUIDE TO THE AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS (AFOSI)

The Air Force Office of Special Investigations (AFOSI) provides specialized investigations and services to protect the Department of the Air Force and Department of Defense (DoD) personnel, operations, and interests. AFOSI is the designated Military Criminal Investigation Organization (MCIO) and Military Department Counterintelligence Organization (MDCO) for the Department of the Air Force. Select AFOSI agents are also members of the Special Victim Investigation and Prosecution (SVIP) capability.

Organization

- AFOSI is removed from command channels and functions as an independent, centralized organization to ensure unbiased investigations
- AFOSI missions include investigating allegations of criminal activity and fraud, as well as counterintelligence and specialized investigative activities, counter-drug activities, protective service operations, and integrated force protection

Requesting AFOSI Investigative Service

- Any Department of the Air Force commander responsible for security, discipline, or law enforcement may request investigative support
- Only the Secretary of the Air Force (SecAF) may direct AFOSI to delay, suspend, or terminate an investigation, unless the investigation is conducted at the request of the DoD Inspector General (DoD/IG)
- AFOSI briefs Department of the Air Force commanders on the progress of investigations affecting their command as necessary
- Coordination with AFOSI and the staff judge advocate (SJA) is required prior to commanders reassigning a person subject to an AFOSI investigation or ordering/permitting a commander directed inquiry or investigation when there is an ongoing AFOSI investigation
- AFOSI investigative responsibilities
 - Coordination between AFOSI and Security Forces Office of Investigations (SFOI) is required to make best use of investigative resources, taking into consideration technical expertise, investigative capability, and available manpower
 - Generally, AFOSI will only investigate major offenses
 - Minor offenses are usually handled by SFOI
 - AFOSI initiates investigation into **ALL** allegations of sexual assault that occur within its jurisdiction, regardless of the severity of the allegation

Mutual Support Agreements

- Command Role:
 - AFOSI requests, and the appropriate commander or magistrate (if designated) issues, search and seizure authorizations based on probable cause requirements. Consultation with the SJA is required in every case involving a probable cause determination.
 - Operational security (OPSEC) of AFOSI investigations is critical

- Knowledge of an ongoing AFOSI investigation by unnecessary parties may jeopardize operations and compromise efforts to neutralize criminal or counterintelligence threats
 - Exposure of AFOSI sources, agents, witnesses, and investigative techniques could place persons and evidence at risk
 - Restrict information to base and staff officials on a strict “need-to-know” basis
- Crime scene protection support
 - AFOSI depends on command support and resources to protect crime scenes
 - Untrained personnel, though well-intentioned, who disturb or change the physical environment or handle objects at the crime scene can alter or destroy critical evidence
- Members of the Security Forces Squadron (SFS) are usually the first responders who secure and protect the scene for AFOSI
 - Exclude witnesses, curiosity seekers, and limit to minimum number of authorized personnel necessary (e.g., medical, fire department)
 - Rank or official position alone should not justify entry
- Protection of agent’s grade
 - Mission success is enhanced by concealing the rank of AFOSI special agents
 - Commanders are required to ensure special procedures exist to protect agents’ personnel, medical, and other administrative records
 - Host commander may authorize permanent or temporary housing in officer’s quarters
 - AFOSI personnel may wear civilian clothes while performing their duties
- Complaints against AFOSI personnel should be referred to the person’s immediate commander for thorough and expeditious investigation by AFOSI, which has its own internal affairs section
- AFOSI Support to Command:
 - AFOSI developmental files
 - Preliminary inquiry initiated by the AFOSI commander (AFOSI/CC) or an AFOSI regional commander and used to examine situation to determine if there is criminal activity warranting an investigation
 - Information systematically collected on specific types of offenses or targets, typically using confidential informants or undercover agents
 - Information analyzed to determine need for individual substantive cases
 - Child abuse/neglect
 - Assist command in the family advocacy program (FAP)
 - All allegations of serious child abuse, maltreatment, or neglect must be reported to AFOSI, regardless of the origin of complaint (personnel of family support and child care centers, equal opportunity, medical, etc.)
 - AFOSI has greater access to certain records
 - AFOSI can provide fact-finding role to assist command and staff to make decisions

AFOSI Special Victim Investigation and Prosecution (SVIP) Capability

- DoD policy requires each military service to maintain a SVIP capability comprised of specially trained MCIO investigators, judge advocates, paralegals, and victim/witness assistance personnel in support of victims of rape, sexual assault, child sex assault, and other crimes of serious violence

AFOSI's Specialized Functions

- Counterintelligence Mission:
 - Sole Department of the Air Force entity responsible for conducting counterintelligence (CI) investigations and operations
 - Headquarter (HQ) AFOSI's legal office (AFOSI/JA), not the base legal office, is responsible for providing legal advice on all CI activities
- Sole manager of the Department of the Air Force's polygraph program
- Specially trained mental health professionals using supervised cognitive interviews or forensic hypnosis as an aid to witness or victim memory enhancement
- Provide law enforcement and counterintelligence support for Air Force and Space Force nuclear envoys
- Regionally located investigators serve as specialists in the investigation of cybercrime, e.g., computer network intrusions and computer media search and seizure
- Forensic Science Consultants:
 - Regionally located experts with forensic sciences masters degrees
 - May provide consultation, training, or specialized investigative techniques
- Technical Services:
 - Process and support requests to intercept wire, oral, or electronic communications for law enforcement or counterintelligence purposes
 - Technical surveillance countermeasures
 - Detection and neutralization of technical surveillance devices deployed against Department of the Air Force facilities
 - Conducts security vulnerability assessments
- Protective Services:
 - Provides threat assessments, protects designated Department of the Air Force officials, and protects foreign official guests of the DoD
 - Provides assessments and estimates on terrorist and foreign intelligence threats to deployments, exercises, weapons facilities, and other base facilities upon request
- Security Violations:
 - AFOSI investigates all security incidents of espionage, suspected compromise of special access information, or deliberate compromise of classified information
 - Does not investigate routine security violations

AFOSI Policy Information

- Apprehension/Arrest:

- Civilian special agents are authorized to arrest civilians under many circumstances. However, not all detachments have civilian agents. In addition, this authority will be used judiciously and only when necessary.
 - Civilian agents' authority is derived from 10 U.S.C. § 9027
- Military agents' authority is derived from the Manual for Courts-Martial (MCM)
 - Limited to individuals subject to the Uniform Code of Military Justice (UCMJ), not family members or nonmilitary U.S. citizens
 - Only if required by operation or emergency (security forces routinely do so at AFOSI's request)
 - Military law enforcement personnel may temporarily detain civilians suspected of on-base offenses until civilian authorities arrive

- Arming:

- AFPD 71-1, *Criminal Investigations and Counterintelligence*, authorizes agents to carry government issued or approved privately owned firearms (including concealed firearms) for duties
- AFOSI offices are required to maintain at least one handgun and ammunition for each agent assigned

- Sources and Undercover Agents:

- Human sources of information may be overt (official) or covert (confidential)
- AFOSI undercover agents are specially trained to perform duties
- OPSEC and safety concerns dictate identity protections
 - Investigative reports may conceal identities of sources. Release of identities require either concurrence of AFOSI detachment commander or the special agent in charge or an order from a military judge.
 - Threatened Person Assignment (TPA) is a personnel program. AFOSI provides threat validation and assessment as prelude to reassignment action.

Types of AFOSI Reports

- Routinely Provided:

- Information routinely provided to commanders and their representatives (e.g., SJA)

- Interim Case Reporting:

- AFOSI may up-channel internal reporting of special interest cases where publicity or Congressional interest is expected
- Informs HQ AFOSI, Air Staff, commanders, and other agencies of significant matters affecting the Department of the Air Force and the DoD
- Separate and distinct from major command up-channel reporting

- Report of Investigation (ROI):
 - Provided to command officials when investigation is complete
 - Information obtained through investigation and witness interviews
 - No recommendations or suggestions on appropriate command action
- Special Reports:
 - Provided by HQ AFOSI highlighting a particular kind of investigative activity and pinpointing problems so commanders can better handle them
 - Provides description of weaknesses or susceptible areas under command to alert functional managers for possible correctional or remedial actions (e.g., fraud information reports, narcotics information reports, and narcotics briefs)
 - Reports requested by the Air Staff or other senior Department of the Air Force or DoD officials containing in-depth analysis of some area of concern Department of the Air Force-wide (e.g., damage to aircraft)
- Command Reporting of Actions Taken:
 - Commanders must provide AFOSI with a report of action taken
 - Allows AFOSI to ensure command action is included in appropriate national level databases

Release of Information

- AFOSI records are “For Official Use Only” and should be treated as sensitive records covered by Privacy Act
- Safeguarding, handling, and releasing information from AFOSI reports:
 - May be released in whole or in part, only to persons who require access for official duties
 - Refer all requests for release to non-Air Force or non-Space Force officials to the servicing AFOSI detachment
 - In the absence of a governing agreement, only HQ AFOSI may authorize release outside the Air Force or Space Force; or release or deny information under Freedom of Information Act (FOIA) or Privacy Act (law enforcement records exemption)
- Press or news inquiries for information require close coordination between public affairs, SJA, and AFOSI in all cases

REFERENCES

Civil Special Agents of the Office of Special Investigations, 10 U.S.C. § 9027

Military Rule of Evidence 507 (2019)

DoDI 5505.18, *Investigation of Adult Sexual Assault in the Department of Defense* (22 March 2017), incorporating through Change 2, 31 January 2019

DoDI 5505.19, *Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs)* (3 February 2015), incorporating through Change 2, 23 March 2017

DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016)

AFI 36-2110, *Total Force Assignments* (5 October 2018)

AFI 71-101 V1, *Criminal Investigations Program* (1 July 2019)

AFI 71-101 V2, *Protective Service Matters* (20 May 2019)

AFI 71-101 V3, *The Air Force Technical Surveillance Countermeasures (TSCM) Program* (21 May 2019)

AFI 71-101 V4, *Counterintelligence* (2 July 2019)

AFMD 39, *Air Force Office of Special Investigations* (14 April 2020)

AFPD 71-1, *Criminal Investigations and Counterintelligence* (1 July 2019)

FUNCTIONS OF THE AREA DEFENSE COUNSEL (ADC)

The area defense counsel (ADC) provides Department of the Air Force members with free, confidential, and independent legal representation. Airmen and Guardians suspected of a criminal offense or facing an adverse administrative action receive legal advice from an experienced, certified judge advocate.

- The ADC represents Department of the Air Force members in the following areas:
 - Courts-martial
 - Administrative separation actions
 - Article 32 preliminary hearings
 - Nonjudicial punishment (NJP) actions under Article 15 of the Uniform Code of Military Justice (UCMJ)
 - Criminal investigations, administrative investigations, interrogations, and inquiries in which the member is suspected of misconduct, has violated the UCMJ, or faces adverse administrative action
 - When a service member requests a defense counsel pursuant to the service member's right not to self-incriminate under Article 31, UCMJ
 - Any other adverse administrative actions for which legal counsel is required or authorized, including but not limited to Letters of Counseling (LOCs), Admonishment (LOAs), or Reprimand (LORs), Unfavorable Information Files (UIFs), Control Rosters, referral performance reports, administrative demotions, promotion proprietary actions (PPAs), officer grade determinations (OGDs), and Flying Evaluation Boards (FEBs)
- All ADCs are assigned outside the local chain of command, operate independently of the local chain of command, and maintain an office physically separate from the base legal office to avoid conflicts of interest or command influence
 - The ADC's responsibility is to zealously and ethically represent the client, which may include meeting with or advocating directly to commanders and unit leadership
 - Acting as a legal representative for the client alone, the ADC is ethically prohibited from sharing any details of the representation of the client or any confidential client communications with third parties, unless the client specifically authorizes the ADC to do so
- Department of the Air Force members facing any type of investigation or adverse administrative action should be promptly referred to the ADC
 - Civilians are not entitled to ADC representation
 - Air National Guard (ANG) members are provided ADC representation when command takes adverse administrative action against the member
 - Resources permitting, reservists facing administrative discharge action that are board-entitled will be represented by the ADC nearest to the location of their reserve unit. Additionally, reservists facing military criminal investigation or any other adverse administrative action will generally be represented by the ADC nearest to the location of their reserve unit
- The ADC program requires strong command and staff judge advocate (SJA) support to maintain the integrity and fairness of the military justice system

- The ADC is available, subject to workload and client confidences, to help educate the base population on the military justice system and the ADC's function

REFERENCE

AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI 51-201_ DAFGM2021-01, 5 January 2021

COMMAND RESPONSE TO SEXUAL OFFENSES

There are many different legal categories of sexual offenses, but for this discussion, the term “sexual assault” will be used generally to refer to anything from a slap on the buttocks to forcible rape. The Department of the Air Force’s response to sexual assault is both proactive and reactive. On both fronts the Department of the Air Force utilizes a multidisciplinary approach. On the proactive front, the Sexual Assault Prevention and Response (SAPR) office is the lead agency for prevention. Prevention addresses a number of areas such as education and establishing an appropriate Department of the Air Force climate. The SAPR office has the lead in the area of sexual assault prevention, but every Airman and Guardian and every agency must play a role for prevention to work. The Department of the Air Force responds to sexual assault as an institution, but a number of specific agencies respond to individual cases depending on the facts of the case. These agencies include the SAPR office, Family Advocacy Program (FAP), the Air Force Office of Special Investigations (AFOSI), the legal office (JA), medical and mental health providers, the chaplain’s office (HC), a member’s chain of command, and many others. Ultimately, the member’s commander will also be involved. Commanders are responsible for the good order and discipline within their unit and therefore have unique responsibilities regarding their response to an allegation of sexual assault and sexually related offenses.

Special Considerations Unique to Sexual Assault Cases

- The legal landscape in the area of sexual assault is changing very rapidly. There has been a host of legal changes in consecutive National Defense Authorization Acts (NDAA) beginning in 2012. These NDAA changes resulted in sweeping legal changes to federal law (primarily in Chapter 10 of the United States Code), the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial (RCM), Military Rules of Evidence (MRE), and numerous Air Force Instructions.
- With so many legal changes and more likely to come, it is imperative commanders consult with their respective staff judge advocate (SJA) early on in any sexually related offense. Below are several important areas all commanders must be aware of and consider when dealing with any sexual offense.
 - Authority to Investigate: AFOSI is the lead agency to investigate sexual allegations regardless of the severity of the offense. A commander should ensure that any allegation of a sexual offense is communicated to both AFOSI and their respective SJA.
 - Disposition Authority: By order of the Secretary of Defense (SecDef), effective 28 June 2012, the O-6 Special Court-Martial Convening Authority (SPCMCA) is the initial disposition authority for certain sexual assault cases and all offenses arising from or relating to the qualifying incident(s). This does not prevent a squadron or group commander from preferring charges for sexual assault, but it does mean that any decision not to prefer charges based on an allegation of sexual assault will be reviewed at higher levels. Early collaboration between the command, AFOSI, and the SJA is critical to ensure commanders are in compliance with the SecDef’s initial disposition authority policy.
 - Mandatory Recommendation for Discharge for Perpetrator of Sexual Assault: Sexual assault is incompatible with military service. In accordance with AFI 36-3208, *Administrative Separation of Airmen*, if a commander believes that a member committed a sexual assault, they must evaluate the specific circumstances of the offense, the member’s record and potential for future service, and take prompt action to initiate discharge or waiver action. The member must be recommended for discharge unless the member meets all of the specified retention criteria listed in the AFI 36-3208. Sexual assault, for the purposes of the administrative

separation instruction, is defined very broadly. Again, SJA consultation is essential to ensure compliance with applicable Department of the Air Force policy and instructions. The initiation of court-martial charges generally takes precedence over the decision of whether or not to initiate discharge.

- Discharging a Victim of a Sexual Assault: There are special discharge processing requirements for Airmen and Guardians who have made unrestricted reports of sexual assault. AFI 36-3208 provides victims the opportunity to request the General Court-Martial Convening Authority (GCMCA) review their discharge case if the victim made an unrestricted report of sexual assault within the 12 months prior to being notified of an involuntary discharge and the victim believes the discharge was initiated in retaliation for making the unrestricted report.
- Mandatory General Court-Martial (GCM) and Statute of Limitations: Specified sexual assault offenses, generally penetrative offenses, referred to a court-martial are now required to be referred to a GCM. A punitive discharge is now mandatory for a conviction of certain sexual offenses. There is no longer a statute of limitations for certain sexual assault offenses.
- Victim Consultation: Victims have a number of rights under Article 6b, UCMJ. In an effort to ensure victims are accorded their rights, commanders and legal offices are required to consult with victims of all crimes prior to taking a number of military justice related actions. The list of actions is provided in AFI 51-201, *Administration of Military Justice*, Chapter 16.
- Sex Offender Registration: It is the policy of the DoD that any service member convicted in a general or special court-martial of any specified sexual offense must register with the appropriate authorities in the jurisdiction the service member will reside, work, or attend school upon leaving confinement (or upon conviction if not confined)
 - The specific offenses requiring a convicted member to register are listed in DoDI 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, Appendix 4 to Enclosure 2. However, it is important to note that sex offender registration requirements vary by state and may be triggered by offenses not listed in Enclosure 2 of DoDI 1325.07.

Commander Response to Allegations of Sexual Assault

- Commanders notified of a sexual assault through unrestricted reporting must take immediate steps to ensure the victim's physical safety, emotional security, and medical treatment needs are met, and that AFOSI or appropriate criminal investigative agency is notified
- Commanders have a role in preventing retaliation against victims, their family members, witnesses, first responders, and bystanders for their complaints, statements, testimony, and status in connection with sexual assault, including ensuring that subordinates in the command are aware of their responsibilities in preventing such retaliation
- The appropriate commander should determine whether temporary reassignment or relocation of the victim or subject is appropriate; upon request, this could possibly include a permanent change of station, including an expedited transfer or humanitarian reassignment
- Commanders should consider whether no contact orders or Military Protective Orders (DD Form 2873) are required
- The immediate commander of the subject of a sexual assault must keep in mind that the subject is presumed innocent until proven guilty. Monitor the well-being of the alleged offender, particularly for any indications of suicidal ideation or other unhealthy attempts to cope with stress, and ensure appropriate assistance is rendered. Consult with medical and mental health providers for appropriate courses of action, as needed.

- The immediate commander of any victim who has filed an unrestricted report is required to attend monthly case management group (CMG) meetings, chaired by Wing leadership to carefully consider and implement immediate, short-term, and long-term measures to help facilitate and assure the victim's well-being and recovery from the sexual assault

REFERENCES

UCMJ arts. 6b, 18, 43, 56, 120, 120a, 120b, and 120c

Secretary of Defense, 10 U.S.C. § 113

Rule for Courts-Martial 306 (2019)

Memorandum, Secretary of Defense, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases* (20 April 2012)

DoDI 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (11 March 2013), incorporating through Change 4, 19 August 2020

DoDI 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures* (28 March 2013), incorporating Change 4, 11 September 2020

AFMAN31-115V1, *Department of the Air Force Corrections System* (22 December 2020)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2018-01, 1 July 2020

AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI 51-201_DAFGM2021-01, 5 January 2021

AFI 71-101V1, *Criminal Investigations Program* (1 July 2019)

AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program* (15 July 2020)

SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR)

Sexual assault is criminal conduct. It falls short of the standards America expects of its men and women in uniform and civilian members. It violates Department of the Air Force core values. Incidents of sexual assault corrode the very fabric of our Wingman culture; therefore we must strive for an environment where this behavior is not tolerated and where all Airmen and Guardians are respected.

- The Department of the Air Force Sexual Assault Prevention and Response (SAPR) policy and responsibilities apply to all levels of command and all Air Force and Space Force organizations and personnel, including Regular Air Force (RegAF), Department of the Air Force government civilian employees, United States Air Force Academy (USAFA), Air National Guard (ANG), and Air Force Reserve (AFR) components
- Installation commanders will implement local SAPR programs. The installation vice commander or equivalent may be designated as the responsible official to act for the installation commander and supervise the installation Sexual Assault Response Coordinator (SARC).

Definition of Sexual Assault

- Sexual assault is intentional sexual contact, characterized by use of force, threats, intimidation, or abuse of authority, or when the victim does not or cannot consent. The term includes a broad category of sexual offenses, consisting of the following specific Uniform Code of Military Justice (UCMJ) offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these acts.
- This definition is for training and educational purposes only and does not affect, in any way, the definition of any offenses under the UCMJ. Commanders are encouraged to consult with their staff judge advocate (SJA) for complete understanding of this definition in relation to the UCMJ.

Installation SAPR Office

- Sexual Assault Response Coordinator (SARC):
 - The SARC serves as the single point of contact at an installation or within a geographic area for integrating and coordinating sexual assault victim care from an initial report of sexual assault, through disposition and resolution of issues related to the victim's health and well-being
 - The installation SARC can be a civilian or military member
 - Reporting directly to the installation or host wing commander, the SARC implements and manages the installation level SAPR programs
 - The SARC is responsible for assisting commanders in meeting annual sexual assault prevention and response training requirements
 - The SARC is responsible for ensuring a victim support system that provides a 24 hours a day, seven days a week sexual assault response capability for all victims that fall under the SAPR program within his or her designated area of responsibility
 - The SARC will provide updates to the victim and commanders as appropriate and in accordance with Department of the Air Force policy
 - The SARC will supervise the Sexual Assault Prevention and Response Victim Advocates (VAs) and Volunteer Victim Advocates (VVAs)

- Sexual Assault Prevention and Response VA and VVAs:

- Responsibilities of SAPR VAs and VVAs include providing crisis intervention, referral, and ongoing non-clinical support, including information on available options and resources to assist the victim in making informed decisions about the case. VA services will continue until the victim states support is no longer needed.
- SAPR VAs and VVAs must possess the maturity and experience to assist in a very sensitive situation
 - SAPR VAs are typically GS-11 civilian employees who work full-time in the SAPR office
 - VVAs are volunteers
 - Only RegAF military personnel and DoD civilian employees selected by the SARC may serve as VVAs. Civilian (appropriated fund) VVAs must be in the grade of GS-7 or higher. Military VVAs must be in the grade of E-4 or higher and at least 21 years of age for enlisted members and in the grade of O-2 for officers. However, officers in the grade of O-1 that were prior enlisted are eligible to become VVAs.
 - Due to the potential for conflicts of interest, members in certain positions or certain career fields are ineligible to serve as a SARC, SAPR VA or VVA. These positions and career fields include commanders, first sergeants, Chief Master Sergeants, personnel assigned to the legal office, Area Defense Counsel (ADC), Inspector General (IG), Air Force Office of Special Investigations (AFOSI), Security Forces Squadron (SFS), Equal Opportunity (EO) office, wing chaplain's office, health care providers, emergency medical technicians, and firefighters.
- SAPR VAs and VVAs do not provide clinical counseling or other professional services to a victim. Appropriate agencies will provide clinical, legal, and other professional services.
- SAPR VAs and VVAs may accompany the victim, at the victim's request, during investigative interviews and medical examinations
- Communications between victims of a sexual or violent offense and SARCs, SAPR VAs, and VVAs are privileged under Military Rule of Evidence 514 in cases arising under the UCMJ if the communication is made for the purpose of facilitating advice or assistance to the alleged victim. Consult the local legal office for exceptions to this general rule.

SAPR Response to Allegations of Sexual Assault

- Upon notification, if the victim desires SAPR services:
 - The SAPR office will determine program eligibility
 - The following individuals are generally eligible for both restricted and unrestricted reporting options: RegAF members and their dependents 18 and older, and Air Reserve Component (ARC) members in Title 10 status at the time of the assault
 - The following non-military individuals are only eligible for the unrestricted reporting option: DoD civilian employees' dependents 18 years of age and older when stationed or performing duties outside the continental United States (OCONUS), and U.S. citizen DoD-contractor personnel when authorized to accompany the Armed Forces in a contingency operation OCONUS and their employees who are U.S. citizens
 - DoD civilian employees CONUS and OCONUS will have both reporting options of restricted and unrestricted reporting. DoD civilians will have access to the full SAPR services that are offered to service members, but this does not include additional medical entitlements or legal services to which they are not already authorized by law or policy.

- SAPR services are not provided for victims who are assaulted by their spouse, same-sex domestic partner, or unmarried intimate partner, or military dependents who are 17 years old or younger. Due to the heightened risk of violence, those cases are handled by the Family Advocacy Program (FAP) and must be referred to FAP.
- Victims can be referred to FAP through command channels or by the SARC once it is determined FAP services are the most appropriate
 - In cases where the subject and victim are unmarried intimate partners, the case will be referred to FAP
 - If the victim chooses not to engage in FAP services, the victim may choose SAPR services, but the Case Management Group (CMG) must be informed of the safety risks with the victim and ensure a safety plan is coordinated by the SARC with the victim
- The SARC, SAPR VA, or on-call VVA will meet with the victim and discuss the restricted and unrestricted reporting options
 - Unrestricted Reports: An unrestricted report of sexual assault must be reported to AFOSI and may result in a formal investigation
 - Any report of a sexual assault made through the victim's chain of command, law enforcement, and AFOSI, or other criminal investigative service is considered an unrestricted report
 - The victim can also elect to make an unrestricted report
 - Restricted Reports: Restricted reports will not be referred to AFOSI for investigation. A restricted report can only be made to a SARC, SAPR VA, VVA, or healthcare provider (which includes FAP).
 - Restricted reporting is intended to give a victim additional time and increased control over the release and management of the victim's personal information, and to empower the victim to seek relevant information and support to make an informed decision about participating in the criminal process
 - Restricted reports may be disclosed only under very limited circumstances (e.g., a serious or imminent threat to life). When disclosure is deemed necessary, only the minimum amount of information necessary to address the issue will be divulged.
 - Independent Investigations (also referred to as third party reports): Should information about a sexual assault be disclosed to command or law enforcement from sources independent of the victim (such as a friend or witness), and an investigation into an allegation of sexual assault is initiated, that report is considered an independent investigation. An official investigation may be initiated based on that independently acquired information.
 - When the SARC or SAPR VA learns that a law enforcement official has initiated an official investigation that is based upon independently-acquired information, and after consulting with the law enforcement official responsible for the investigation, the SARC or SAPR VA will notify the victim, as appropriate
 - If the victim has already made a restricted report, covered communications from the restricted report will not be released for the investigation unless the victim authorizes the disclosure in writing or another exception applies

- Unauthorized disclosures have no impact on the status of the restricted report. All restricted reporting information is still confidential and protected. Unauthorized or inadvertent disclosures made to a commander (or equivalent), supervisor, or law enforcement will result in notification to AFOSI or equivalent Military Criminal Investigative Organization (MCIO), which may start an investigation. An independent investigation does not, in itself, convert the restricted report to an unrestricted report.
- Assignment of a Victim Advocate
 - A VA may be assigned to the victim. To the extent practicable, the assigned VA will not be from the same unit as the victim.
 - The VA will provide support throughout the process. The VA will provide referral and ongoing non-clinical support to the victim.
 - Services will continue until the victim indicates services are no longer required, or the SARC makes this determination based on the victim's response to offers of assistance

Other SAPR Related Issues

- Expedited Transfers:

- An expedited transfer provides eligible victims who file an unrestricted report of certain qualifying sexual and other related offenses (violations articles 120, 120c or 130 of the UCMJ) the option of a permanent change of station (PCS) or a temporary or permanent change of assignment (PCA) to a location that will assist with the immediate and future welfare of the victim, while also allowing them to move to locations that can offer additional support to assist with healing, recovery, and rehabilitation
- An expedited transfer is available for RegAF victims, non-prior service Airmen and Guardians performing initial skills training, ANG and ARC members who have made an unrestricted report through either the SAPR program or the FAP. The expedited transfer program was expanded to allow the transfer of a service member, whose adult military dependent is the victim of an offense listed above in cases where the offense was perpetrated by another service member not related to the victim or in cases with a military nexus between the offense and dependent's status.
- Upon receiving a request for expedited transfer, the installation or host wing commander can consider potential transfer of the alleged offender instead of the victim, if appropriate. Alleged offender reassignments are handled in accordance with 10 U.S.C. § 674 and AFI 36-2110, *Total Force Assignments*. Transfers for offenders are not in the duties and responsibilities of the SARC or SAPR VA.
- Victims are generally only eligible to receive one facilitated expedited transfer for an unrestricted report of sexual assault. Multiple reassignment requests for the same reported incident may be considered if exceptional circumstances warrant.
- Victims in FAP cases may also request an expedited transfer. The process is the same. The SARC will facilitate the process which can be found in DAFI 40-301, *Family Advocacy Program*.
- Expedited transfer requests not falling within the scope of SAPR or FAP are processed by VWAP personnel

- Processing expedited transfer requests:
 - The victim, with the assistance of the SARC, makes the request for an expedited transfer
 - The victim's commander (or equivalent) makes a recommendation to the host wing/installation commander for approval or disapproval. The victim's commander should base his or her recommendation upon all available information, especially that provided by AFOSI, and after consultation with the SJA.
 - The installation or host wing commander shall establish a presumption in favor of transferring a victim following a credible report of sexual assault. The installation or host wing commander makes a decision which, if approved, is forwarded by the victim through the virtual MPF to Air Force Personnel Center (AFPC) for transfer orders.
 - The installation or host wing commander must make a decision no more than five calendar days from the request
 - If disapproved by the wing/installation commander, the victim may appeal to the first/next general officer in the chain of command. If disapproved at this level the victim may make a final appeal to the major command (MAJCOM) vice commander (MAJCOM/CV).
- Case Management Group (CMG) Meetings:
 - SARCs and commanders, along with AFOSI, medical, SJA, and other agencies, meet monthly to discuss unrestricted reports of sexual assault on the installation. The CMG is convened to address cohesive emotional, physical, and spiritual care of a victim in a collaborative environment. The CMG will convene for reports of sexual assault perpetrated by someone other than a spouse or intimate partner cases. The CMG is chaired by the host wing or vice wing commander.
 - The CMG will also discuss instances of retaliation
 - The victim's commander is a mandatory member of the CMG and he or she may not delegate the responsibility to attend the CMG. Within 72 hours after the CMG, the commander will provide the victim with an update regarding the investigation, medical, legal, status of an expedited transfer request, any other request made by the victim, and command proceedings regarding the sexual assault from the date the investigation was initiated until there is a final disposition of the case.
 - The CMG will form a High-Risk Response Team (HRRT) for victims who are assessed through a safety assessment. An HRRT is established immediately in each case and must report findings to the installation commander within 24 hours of being activated.
- Retaliation:
 - Air Force and Space Force personnel who file an unrestricted or restricted report of sexual assault will be protected from reprisal, coercion, ostracism, maltreatment, retaliation, or threat of the same as a result of reporting a sexual assault
 - Air Force and Space Force personnel who are bystanders, witnesses, or first responders to unrestricted or restricted reports of sexual assaults are also protected from retaliation pursuant to the DoD Retaliation Prevention and Response Strategy

- At every CMG meeting, the CMG Chair will ask the CMG members if the victim, witnesses, bystanders (who intervened), SARCs and SAPR VAs, responders, or other parties to the incident have experienced any incidents of coercion, retaliation, ostracism, maltreatment, or reprisals. If any incidents are reported, the installation commander will develop a plan to immediately address the issue. The coercion, retaliation, ostracism, maltreatment, or reprisal incident will remain on the CMG agenda for status updates, until the victim's case is closed.
- Addressing Victim Misconduct:
 - An investigation into the facts and circumstances surrounding an alleged sexual assault may develop evidence that the victim engaged in misconduct such as underage drinking or other related alcohol offenses, adultery, drug abuse, fraternization, or other violations of instructions, regulations, or orders
 - In accordance with the UCMJ, the Manual for Courts-Martial (MCM), and Department of the Air Force instructions, commanders are responsible for ensuring victim misconduct is addressed in a manner that is consistent and appropriate to the circumstances
 - Commanders have the authority to determine the appropriate disposition of alleged victim misconduct, to include deferring disciplinary action until after disposition of the sexual assault case
 - When considering what corrective actions may be appropriate, commanders must balance the objectives of holding members accountable for their own misconduct with the intent to avoid unnecessary additional trauma to sexual assault victims and to encourage reporting of sexual assault
 - The gravity of any collateral misconduct by the victim and its impact on good order and discipline should be carefully considered in deciding what, if any, corrective action is appropriate
 - A Special Victims' Counsel (SVC) and/or an ADC may be representing victims on matters of victim misconduct
 - Commanders are expected to consult with their servicing SJA and use appropriate personnel actions to resolve any allegations
 - Administrative separation actions involving victims of sexual assaults will be processed as required by the applicable Department of the Air Force instructions
 - When a commander proposing administrative or medical separation action was previously aware, or is made aware by the respondent or others, that the member has filed a past complaint, allegation, or charge that they were a victim of sexual assault, the proposing commander shall ensure the separation authority is aware that the discharge proceeding involves a victim of sexual assault
 - The separation authority must be provided sufficient information concerning the reported assault and the victim's status to ensure a full and fair consideration of the victim's military service and particular situation
 - An Airman or Guardian who made an unrestricted report and is recommended for an involuntary separation within one year of final disposition of their sexual assault allegation has the right to request the General Court-Martial Convening Authority (GCMCA) review the administrative or involuntary discharge (see "Command Response to Sexual Assault" for more detail)

REFERENCES

- Temporary Administrative Reassignment or Removal of a Member on Active Duty Accused of Committing a Sexual Assault or Related Offense, 10 U.S.C. § 674
- DoDI 6495.02, *Sexual Assault Prevention and Response Program (SAPR) Procedures* (28 March 2013), incorporating Change 4, 11 September 2020
- DoDD 6495.01, *Sexual Assault Prevention and Response (SAPR) Program* (23 January 2012), incorporating Change 4, 11 September 2020
- AFI 36-2110, *Total Force Assignments*, including AFI36-2110_AFGM2021-01, 26 January 2021
- DAFI 40-301, *Family Advocacy Program* (13 November 2020)
- AFPD 90-60, *Sexual Assault Prevention and Response (SAPR) Program* (20 March 2019)
- AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program* (15 July 2020)
- AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2020-01, 1 July 2020
- AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_DAFGM2021-01, 5 January 2021
- DoD Retaliation Prevention and Response Strategy: Regarding Sexual Assault and Harassment Reports (April 2016)

SPECIAL VICTIMS' COUNSEL (SVC) PROGRAM

The Special Victims' Counsel (SVC) program was established in order to empower victims of sex-related offenses and domestic violence offenses through the military legal system by allowing for a confidential, attorney-client relationship between an SVC and a qualifying victim. This relationship gives victims a voice and a choice in the legal process, and provides victims with an attorney who will advocate on their behalf to protect their rights throughout the legal process.

Objectives of the SVC Program

- The objectives of the Department of the Air Force SVC Program are to:
 - Provide victims of qualifying offenses with independent and privileged legal representation with respect to issues arising from or related to the qualifying offenses, to include investigation and prosecution of those offenses
 - Empower victims of qualifying offenses by providing professional and knowledgeable counsel to enable them to express their choices
 - Provide advocacy to protect the rights afforded to victims

Overview of the SVC Program

- On 28 January 2013, the United States Air Force implemented a Special Victims' Counsel (SVC) Program by providing qualified judge advocates to represent eligible sexual assault victims
- The Fiscal Year (FY) 2014 National Defense Authorization Act (NDAA) and 10 U.S.C. §1044e mandated all the Military Services to designate Special Victims' Counsel
- Section 548 of the FY 2020 NDAA mandated all the Military Services to provide legal counsel to eligible victims' of domestic violence offenses
- The AF/JA – Military Justice, Special Victims' Counsel Division (JJS) now includes Special Victims' Counsel and Special Victims' Paralegals at 47 installations divided into five regional circuits around the world. Installations without a local SVC office are assigned to specific SVC offices for services.

Eligibility for Representation

- Certain categories of victims of sexual assault, stalking, other sexual misconduct, and violent domestic assault are eligible for SVC representation
 - Air Force and Space Force members to include active duty service members, United States Air Force Academy (USAFA) cadets, Reservist, and Air National Guard (ANG) members
 - Dependents of Department of the Air Force members, retirees, and Department of Defense (DoD) civilians, if eligible for military legal assistance services and the perpetrator is a military member subject to the Uniform Code of Military Justice (UCMJ)
 - Department of the Air Force civilian employees who are not eligible for military legal assistance services may qualify for SVC services if the perpetrator is a military member subject to the UCMJ and the alleged assault has a nexus to the victims' employment with the military
 - Other service members and their dependents if the perpetrator is a military member subject to the UCMJ. Such individuals will normally be referred to their respective Service's SVC or Victims' Legal Counsel (VLC) programs.
 - Basic military training (BMT) and technical training students who are involved in an unprofessional relationship that involves physical contact of a sexual nature with faculty or staff if the incident occurs within the first six months of their service

- The Chief of the Special Victims' Counsel Division, or designee, may authorize SVC services to otherwise ineligible victims on a case-by-case basis (known as an "extraordinary circumstances request"). Eligibility for services is outlined in 10 U.S.C. §§ 1044, 1044e, and 1565b, as well as Section 548 of the FY 2020 NDAA, along with service policies and regulations.

Notifying Victims of Availability of Special Services

- The first individual to make contact with the victim, such as the Sexual Assault Response Coordinator (SARC), Victim Advocate (VA), Family Advocacy (FAP) representative, investigator, Victim Witness Assistance Program (VWAP) liaison, or trial counsel, is required to inform the victim of the availability of SVC services
 - SVCs are not permitted to solicit clients. Victims must request an SVC in order for services to be rendered.

Scope of Representation

- An SVC's sole role is to represent victims in a confidential, attorney-client relationship, throughout the investigation and prosecution processes
 - Military Justice Advocacy: SVCs enable victims to assert their rights under the law and applicable regulations. Among their many advocacy responsibilities, SVCs:
 - Advocate for a client's interests to commanders, convening authorities, staff judge advocates (SJAs), prosecutors, defense counsel, and military judges
 - Attend interviews with investigators, as well as trial and defense counsel
 - Represent their client at Article 32, UCMJ, preliminary hearings and courts-martial, including in-court representation (i.e., motions to assert rights under Article 6b, UCMJ, Military Rules of Evidence (MRE) 412, 513, and 514, and other evidentiary and legal rights)
 - Assist their clients with post-trial submissions to the convening authority
 - Advise clients on VWAP and coordinate with VWAP liaisons, when appropriate, to ensure client is advised of available resources
 - Assist clients with seeking transitional compensation
 - Liaise with other helping agencies and personnel to facilitate victim support services (i.e.: VWAP, SARC, VA, Domestic Violence Victim Advocate (DAVA), and FAP)
 - Advocacy to the Department of Air Force and DoD Agencies: In coordination with SAPR or FAP, SVCs assist clients with requests for/relating to expedited transfer, victim's safety (e.g., military protective orders (MPOs), temporary restraining orders (TROs), and modifying working conditions), access to medical and mental health care, workplace concerns (e.g., retaliation or peer ostracism), and military benefits
 - Collateral Misconduct: SVCs may represent victims accused of misconduct, in conjunction with a military area defense counsel (ADC) or alone. Collateral misconduct is defined as minor misconduct that might be, in time, place, or circumstance, associated with the victim's assault incident (i.e., a victim drinking underage at the time of the offense).
 - Advocacy to Civilian Prosecutors and Agencies: SVCs may advise clients on United States civilian criminal jurisdiction and may provide limited advocacy regarding a client's interest to civilian prosecutors or agencies

- Legal Assistance: SVCs may provide limited legal assistance related to the reported offense. In most cases, the client will be referred to a local legal office to receive traditional legal assistance services.

Qualifications of SVCs

- An SVC is a judge advocate certified and designated by The Judge Advocate General (TJAG) to represent the interests of victims of certain qualifying offenses
- All SVCs are assigned outside the local chain of command, operate independently of the local chain of command, and maintain an office physically separate from the base legal office to avoid conflicts of interest or command influence. An SVC's chain of command flows through regional SVC circuits to the Chief of the Special Victims' Counsel Division.
 - The SVC's responsibility is to zealously advocate for their client's expressed interests, assist victims by helping them understand the investigatory and military justice process, and to advocate for the client as the SVC determines appropriate
 - The SVC is an advocate for the client, not an advisor for the command or the legal office
- If a victim of a sexual or domestic assault requests an SVC, refer them to the servicing SVC office, SARC, DAVA, FAP, or legal office who will, in turn, coordinate a request for representation

REFERENCES

UCMJ art. 6b

Legal Assistance, 10 U.S.C. § 1044

Special Victims' Counsel for Victims of Sex-Related Offenses, 10 U.S.C. § 1044e

Victims of Sexual Assault, Access to Legal Assistance and Services of Sexual Assault Response Coordinators and Sexual Assault Victim Advocates, 10 U.S.C. § 1565b

FY 2020 National Defense Authorization Act (NDAA), Public Law 116-92, Section 548

AFI 51-201, *Administration of Military Justice* (18 January 2019), including
DAFI51-201_DAFGM2021-01, 5 January 2021

VICTIM WITNESS ASSISTANCE PROGRAM (VWAP)

The Department of the Air Force's Victim and Witness Assistance Program (VWAP) provides guidance for the protection and assistance of victims and witnesses, enhances their roles in the military criminal justice process, and preserves the constitutional rights of an accused. VWAP is a multidisciplinary program established at the installation level. It has three primary objectives: (1) to mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by Department of the Air Force authorities; (2) to foster cooperation between victims, witnesses, and the military justice system; and (3) to ensure best efforts are made to accord victims certain enumerated rights, including those listed in Article 6b, Uniform Code of Military Justice (UCMJ).

Overview

- The Department of the Air Force Responsible Official (the person responsible for coordinating, implementing and managing) for the VWAP is The Judge Advocate General (TJAG). The Local Responsible Official (LRO) at an Air Force or Space Force base is the installation commander or the Special Court-Martial Convening Authority. The LRO often delegates LRO duties to the installation Staff Judge Advocate (SJA).
- The SJA appoints a VWAP Coordinator to implement and manage the VWAP. The VWAP Coordinator is also responsible for conducting annual training and can serve as a victim liaison.
- A victim liaison is an individual appointed by the LRO or delegate to assist a victim during the military justice process. Communications between a victim and victim liaison are **NOT** privileged under Military Rule of Evidence 514.
- Agencies (i.e., Office of the Staff Judge Advocate (SJA), Security Forces Squadron (SFS), Air Force Office of Special Investigations (AFOSI), Sexual Assault Prevention and Response (SAPR), Family Advocacy Program (FAP), Airman and Family Readiness Center (A&FRC), Chaplain's Office (HC), commanders, and first sergeants) work together to develop local training to ensure compliance with VWAP. Annually, all agencies involved in VWAP are responsible for training personnel assigned to their respective agencies on their responsibilities with the program. The SJA trains commanders and first sergeants.
- Each installation should prepare and maintain a victim information packet and the same local agencies listed above should be involved in its preparation. Each identified victim or witness should be provided with an information packet containing the following documents, as appropriate:
 - DD Form 2701, *Initial Information for Victims and Witnesses of Crime*;
 - DD Form 2702, *Court-Martial Information for Victims and Witnesses of Crime*;
 - DD Form 2703, *Post-Trial Information for Victims and Witnesses of Crime*;
 - DD Form 2704, *Victim/Witness Certification and Election Concerning Prisoner Status*; **and**
 - DD Form 2705, *Notification to Victim/Witness of Prisoner Status*

Victim Rights

- Article 6b, UCMJ, established eight rights for crime victims. These rights can be enforced by the Court of Criminal Appeals through a Writ of Mandamus.
 - For the purposes of Article 6b and VWAP, a victim is defined as a person who suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ
 - For VWAP purposes, there is no burden of proof for these rights to apply and a victim shall be identified at the earliest opportunity after the detection of a crime

- A victim has the following rights:
 - To be reasonably protected from the accused
 - To receive reasonable, accurate, and timely notice of specified hearings
 - Not to be excluded from any public hearing or proceeding
 - To be reasonably heard at specified hearings
 - To confer with government counsel for proceeding
 - To receive restitution as provided by law
 - To proceedings free from unreasonable delay
 - To be treated with fairness and with respect for his or her dignity and privacy
- Victims of any offense referred to a court-martial after 1 January 2019 who have suffered direct physical, emotional, or pecuniary harm as a result of the commission of the offense have additional rights. Specifically, such victims have the right:
 - To petition for a hearing before a military judge for relief from an investigative subpoena
 - To be interviewed by defense counsel only in the presence of counsel for the victim, trial counsel, or a victim advocate
 - To submit supplemental materials for consideration by a preliminary hearing officer (PHO) or convening authority within 24 hours after the close of an Article 32, UCMJ, hearing
 - In some cases, to receive a copy of the recording of all open sessions of a court-martial, receive a copy of the record of trial, receive a copy of any action taken by the convening authority, and receive a copy of the entry of judgment

LRO Responsibilities to Crime Victims

- In addition to the proceeding victims' rights, installations have a number of specific responsibilities toward crime victims under VWAP. These responsibilities are delivered by the LRO, law enforcement, commanders, the SJA, confinement facilities, A&FRC, and SAPR as applicable. These responsibilities center on providing victims and witnesses with services and information. Some of the most significant responsibilities include:
 - Inform eligible victims of the ability to consult with special victims' counsel or a legal assistance attorney
 - Inform victims about sources of medical and social services
 - Inform victims of restitution or other relief to which they may be entitled
 - Assist victims in obtaining financial, legal, and other social services
 - Inform victims concerning protection against threats or harassment
 - No less than monthly, provide victims notice of the status of the investigation, prosecution, or alternative disposition of an allegation until final disposition
 - Provide victims notice of significant events such as the conclusion of the investigation, pre-trial confinement proceedings, preferral of charges, initial disposition decisions, Article 32 preliminary hearings, referral of charges, all court proceedings, withdrawal or dismissal of charges, post-trial or vacation hearings, clemency submissions, and appellate proceedings
 - Consult with victims on disposition

- Consult with victims regarding their preference as to whether an offense will be prosecuted by court-martial or in a civilian court with jurisdiction over the offense
- If administrative action is taken
 - LRO may inform the victim that “appropriate administrative action was taken”
 - LRO should consult with the SJA prior to revealing to the victim the specific action taken (i.e., Article 15 punishment and/or administrative discharge) to ensure the release is not inconsistent with the Privacy Act
- Safeguard the victim’s property if taken as evidence and return it as soon as possible. Evidence in a sexual assault case will be returned to the victim as soon as all legal, adverse action, or administrative proceedings are complete
- Consult with victims and consider their views on preferral of court-martial charges, pretrial restraint, dismissal of charges, pretrial agreements, discharge in lieu of court-martial, and scheduling of judicial proceedings. Although victims’ views should be considered, nothing in the VWAP limits the responsibility and authority of officials involved in the military justice process from taking any action deemed necessary in the interest of good order and discipline and/or preventing service discrediting conduct.
- Designate a victim liaison, when necessary

LRO Responsibilities to All Victims and Witnesses

- Notify authorities of threats and assist in obtaining restraining and military protective orders (MPOs)
- Provide a waiting area removed from and out of the sight and hearing of the accused and defense witnesses
- Assist in obtaining necessary services such as transportation, parking, child care, lodging, and court-martial translators and/or interpreters
- If a victim or witness requests, take reasonable steps to inform his or her employer of the reasons for the absence from work and assist in explaining to creditors reasons for any serious financial strain incurred as a direct result of the offense
- Provide victims and witnesses necessary assistance in obtaining timely payment of witness fees and related costs
- In cases involving adverse actions for the abuse of dependents resulting in the separation of the military sponsor, victims may be entitled to receive transitional compensation or payment under the Uniformed Services Former Spouses Protection Act (USFSPA)

REFERENCES

Article 6b, UCMJ

Military Rule of Evidence 514 (2019)

DoDD 1030.01, *Victim and Witness Assistance* (13 April 2004), certified current 23 April 2007

DoDI 1030.02, *Victim and Witness Assistance* (22 September 2020)

DoDI 6400.07, *Standards for Victim Assistance Services in the Military Community* (25 November 2013), incorporating Change 2 (6 July 2018)

DD Form 2701, *Initial Information for Victims and Witnesses of Crime* (March 2016)

DD Form 2702, *Court-Martial Information for Victims and Witnesses of Crime* (March 2016)

DD Form 2703, *Post-Trial Information for Victims and Witnesses of Crime* (March 2016)

DD Form 2704, *Victim/Witness Certification and Election Concerning Prisoner Status* (March 2013)

DD Form 2705, *Notification to Victim/Witness of Prisoner Status* (March 2013)

DAFI 51-201, *Administration of Military Justice* (18 January 2019), including

DAFI 51-201_DAFGM2021-01, 5 January 2021

TRANSITIONAL COMPENSATION FOR VICTIMS OF ABUSE

Federal legislation provides for transitional assistance to abused dependents of military members. The assistance provided can be an extension of benefits and/or a monetary payment for a set period of time. It is the Department of Defense (DoD)'s policy to provide monthly transitional compensation payments and other benefits for dependents of members who are separated for dependent abuse. Applicants initiate requests for transitional compensation through the member's unit commander or Military Personnel Flight (MPF).

Eligibility for Transitional Compensation

- Dependents of members of the armed forces who have been on active duty for more than 30 days and who, after 29 November 1993, are:
 - Separated from active duty under a court-martial sentence resulting from a dependent-abuse offense
 - Administratively separated from active duty, the Reserves, or the Air National Guard (ANG) if the basis for separation includes a dependent-abuse offense
 - Sentenced to forfeiture of all pay and allowances by a court-martial which has convicted the member of a dependent-abuse offense
- Dependents are ineligible to receive any transitional compensation if they remarry, cohabitate with the member, or are found to have been an active participant in the dependent abuse
- Dependent abuse offenses include violations of the Uniform Code of Military Justice (UCMJ) or applicable civilian criminal codes, including attempts or conspiracies to commit offenses such as sexual assault, rape, sodomy, battery, murder, and manslaughter. The facts and circumstances of a particular case should always be interpreted in the manner most favorable to the spouse or dependent child.
- Exceptional Eligibility – 10 U.S.C. § 1059(m) authorizes the Secretary of the Air Force (SecAF) to grant transitional compensation benefits to dependents and former dependents who are not otherwise authorized such benefits. Payments are subject to determination that the former member engaged in a dependent-abuse offense, but was allowed to separate, voluntarily or involuntarily, under other circumstances before a determination was made and/or documented.

Available Benefits

- Monthly monetary compensation
- Commissary and exchange benefits
- Medical and dental care

Application Procedures

- Eligible dependents request transitional compensation by completing DD Form 2698, *Application for Transitional Compensation*
- Requests are made through the member's unit commander or through the MPF at any Air Force or Space Force installation when the applicant is no longer at the installation in which the member was assigned
- A unit representative will assist the dependent with the completion of DD Form 2698
- MPF commander will coordinate the package and obtain a written legal review from the staff judge advocate (SJA). The installation commander is the approval authority.

- Exceptional Eligibility applications are routed through the Air Force Personnel Center (AFPC) and the Military Compensation Policy Division, Department of the Air Force (AF/A1PA), for SecAF's approval or disapproval
- If approved, transitional compensation can last between 12 and 36 months for cases with effective dates prior to 22 September 2014, and for 36 months for cases with an effective date on or after 22 September 2014
- The statutory monthly amount for transitional compensation is adjusted every year in accordance with the Social Security Administration's annual percent cost of living adjustments, which are published in the Federal Register (10 U.S.C. § 1059(f); 38 U.S.C. § 1311(a)-(f)(4); and 42 U.S.C. § 415(i))
 - Effective 1 December 2020, the compensation rate is \$1357.56 per month, plus \$336.32 for each dependent child
 - The current compensation rate can be found at <https://www.va.gov/disability/survivor-dic-rates/>

REFERENCES

Dependents of Members Separated for Dependent Abuse: Transitional Compensation; Commissary and Exchange Benefits, 10 U.S.C. § 1059

Medical and Dental Care for Dependents: General Rule, 10 U.S.C. § 1076

Dependency and Indemnity Compensation to a Surviving Spouse, 38 U.S.C. § 1311

Computation of Primary Insurance Amount, 42 U.S.C. § 415

DoDI 1342.24, *Transitional Compensation (TC) for Abused Dependents* (23 September 2019)

AFI 36-3012, *Military Entitlements* (23 August 2019)

DD Form 2698, *Application for Transitional Compensation* (February 2019)

MEDIA RELATIONS IN MILITARY JUSTICE MATTERS

The Department of the Air Force must balance three important societal interests when there is media interest in military justice proceedings: protection of the accused's right to a fair trial, the privacy rights of all persons involved in the proceedings, and the community's right to be informed of and observe criminal proceedings.

Release of information relating to criminal proceedings is subject to the Privacy Act (PA), Freedom of Information Act (FOIA), victim and witness assistance protection laws, Air Force Rules of Professional Conduct, Air Force Standards for Criminal Justice, implementing directives, security requirements, classified information laws, and judicial orders. It is critical that commanders always consult with the staff judge advocate (SJA) before releasing any information about such proceedings.

Providing Information

- AFI 51-201, *Administration of Military Justice*, covers the rules for releasing information pertaining to criminal proceedings. It prohibits release of information that could reasonably be expected to interfere with law enforcement proceedings or deprive a person of a right to a fair trial or an impartial adjudication in a criminal proceeding.
- The release of extrajudicial statements is a command responsibility. The convening authority responsible for the criminal proceeding makes the ultimate decision about release of extrajudicial statements relating to that criminal proceeding. Major command (MAJCOM) (or equivalent) commanders may withhold release authority from subordinate commanders.
- If a proposed extrajudicial statement is based on information contained in agency records, the office of primary responsibility for the record should also coordinate prior to release
- Rules for release of permissible extrajudicial statements are complex and vary according to the type of information to be released and its source, the type of proceeding, and the stage of the proceeding when the information is released

Extrajudicial Statements Generally

- Extrajudicial statements are oral or written statements made outside of a criminal proceeding that a reasonable person would expect to be disseminated by means of public communication
- There are valid reasons for making certain information available to the public in the form of extrajudicial statements. However, extrajudicial statements must not be used to influence the course of a criminal proceeding.
- Usually, extrajudicial statements should include only factual matters and should not offer subjective observations or opinions

Prohibited Extrajudicial Statements

- Extrajudicial statements relating to the following matters ordinarily have a substantial likelihood of prejudicing a criminal proceeding and generally should not be made
 - The existence or contents of any confession, admission, or statement by the accused, or the accused's refusal or failure to make a statement
 - Observations about the accused's character and reputation
 - Opinions regarding the accused's guilt or innocence
 - Opinions regarding the merits of the case or the merits of the evidence
 - References to the performance of any examinations, tests or investigative procedures (e.g., fingerprints, polygraph examinations, and ballistics or laboratory tests), the accused's failure to submit to an examination or test, or the identity or nature of physical evidence

- Statements concerning the identity, expected testimony, disciplinary or criminal records, or credibility of prospective witnesses
- The possibility of a guilty plea or other disposition of the case other than procedural information concerning such processes
- Information government counsel knows or has reason to know would be inadmissible as evidence in a trial
- Before sentencing, facts regarding the accused's disciplinary or criminal record, including nonjudicial punishment (NJP), prior court-martial convictions, and other arrests, indictments, convictions, or charges. Do not release information about nonjudicial punishment or administrative actions even after sentencing, unless admitted into evidence. However, a statement that the accused has no prior criminal or disciplinary record is permitted.

Permissible Extrajudicial Statements

- When deemed necessary by command, the following extrajudicial statements may be made regardless of the stage of the proceedings, subject to the limitations stated above (i.e., substantial likelihood of prejudice and prohibitions under FOIA, PA, and/or the Victim Witness Assistance Program (VWAP))
 - General information to educate or inform the public concerning military law and the military justice system
 - If the accused is a fugitive, information necessary to aid in apprehending the accused or to warn the public of possible dangers
 - Requests for assistance in obtaining evidence and information necessary to obtain evidence
 - Facts and circumstances of an accused's apprehension, including time and place
 - The identities of investigating and apprehending agencies and the length of the investigation, only if release of this information will not impede an ongoing or future investigation and the release is coordinated with the affected agencies
 - Information contained in a public record, without further comment
 - Information that protects the military justice system from matters that have a substantial likelihood of materially prejudicing the proceedings
 - Such information will be limited to that which is necessary to correct misinformation or to mitigate the substantial undue prejudicial effect of information or publicity already available to the public. This can include, but is not limited to, information that would have been available to a spectator at an open Article 32 preliminary hearing or an open session of a court-martial.
- The following extrajudicial statements may normally only be made after a convening authority has disposed of preferred charges by directing an Article 32 preliminary hearing or has referred the charges to court-martial, subject to the limitations stated above (substantial likelihood of prejudice and prohibitions under FOIA, PA, and/or VWAP)

- The accused's name, unit, and assignment
- The substance or text of charges and specifications, provided there is a statement included explaining that the charges are merely accusations and that the accused is presumed innocent until and unless proven guilty. As necessary, redact all VWAP and PA protected data from the charges and specifications to include the names of any victims.
- The scheduling or result of any stage in the judicial process
- Date and place of trial and other proceedings, or anticipated dates, if known. You may also direct them to the Department of the Air Force's online Public Docket.
- Identity of appointed counsel
- Identities of convening and reviewing authorities
- A statement, without comment, that the accused has no prior criminal or disciplinary record or that the accused denies the charges
- Do not volunteer the identities of the court members or the military judge in material prepared for publication. Prerequisites for release are:
 - Release authorized after the (seated) court members or military judge have been identified in the court-martial proceeding; and
 - The convening authority's SJA determines that release would not prejudice the accused's rights or violate the members' or military judge's privacy interests

Article 32, UCMJ, Hearings

- Article 32 hearings should ordinarily be open to the public
 - Access by spectators to all or part of the proceeding may be restricted or foreclosed by the convening authority who directed the hearing or by the preliminary hearing officer (PHO) when, in that officer's opinion, the interests of justice outweigh the public's interest in access (e.g., protecting the safety or privacy of a witness, preventing psychological harm to a child witness, or protecting classified information)
 - Convening authorities or PHOs must conclude that no reasonable alternatives to such restriction or closure of the preliminary hearing will protect the overriding interest in the case
 - If a convening authority or PHO orders a hearing closed, he/she must make specific findings of fact, in writing, for the closure, which must be attached to the PHO's report

Release of Information from Records of Trial or Related Records

- Once a completed record is forwarded, AF/JA – Military Justice, Law and Policy Division (AJM) is the disclosure authority for all records and associated documents

Reducing Tension with the Media

- Command should take positive steps to reduce tension with the media
 - Have the SJA and public affairs officer (PAO) work together to develop a coordinated press release that explains how the military justice system works and how it compares and contrasts with the civilian system
 - Advise the media up-front of the prohibition against courtroom photography, television, and audio and visual recording, and provide an alternate location, room or office for media interviews, broadcasts, etc.

- Provide reserved seating in the courtroom for at least one reporter and a sketch artist
- Department of the Air Force representatives must not encourage or assist news media in photographing or televising an accused being held or transported in custody

REFERENCES

The Freedom of Information Act, 5 U.S.C. § 552

The Privacy Act of 1974, 5 U.S.C. § 552a

Rules for Courts-Martial 405 (2019)

AFI 33-332, *Air Force Privacy and Civil Liberties Program* (10 March 2020), corrective actions applied, 12 May 2020

DAFI 35-101, *Public Affairs Operations* (20 November 2020)

AFMAN 35-101, *Public Affairs Procedures* (7 December 2020)

AFI 51-110, *Professional Responsibility Program* (11 December 2018)

AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_DAFGM2021-01, 5 January 2021

ADVISING SUSPECTS OF RIGHTS

Commanders should not be in the regular habit of directly questioning members about alleged misconduct. There are numerous avenues available to commanders to get to the bottom of any allegations of misconduct. Among these are commander's inquiry, commander directed investigation, investigations by the Air Force Office of Special Investigations (AFOSI), investigations by the Security Forces Office of Investigations (SFOI), questioning by lower level supervisors, and the likes. Prior to doing the questioning themselves, commanders should contact their legal office to discuss. Generally, this type of questioning should only be regarding minor offenses, otherwise questioning by trained law enforcement professionals is strongly advised. If a commander, or any other person subject to the Uniform Code of Military Justice (UCMJ), needs to question a member suspected of committing some form of misconduct, it is essential to follow the legal requirement of Article 31 of the UCMJ.

Overview

- When a commander, supervisor, first sergeant, law enforcement, or any other person with discipline authority (who is subject to the UCMJ) questions or requests any statement from an Airman or Guardian suspected of an offense, that individual must first inform the Airman or Guardian of their Article 31 rights
- Proper rights advisement enables the government to preserve any admissions or confessions of an offense for later use as evidence for any purpose
- Admissions or confessions made in response to a defective Article 31 rights advisement, or in the absence of a necessary Article 31 rights advisement, cannot normally be admitted as evidence at trial
- Other evidence, both physical and testimonial, that may have been discovered or obtained as a result of the unadvised statements is usually inadmissible at trial

When Article 31 Rights are Required

- When a person subject to the UCMJ suspects someone (also subject to the UCMJ) of an offense and starts questioning or requesting any statement from that individual about the offense of which the person is suspected
- A request for a statement does not have to involve actual questions. Sometimes actions, if they are intended to elicit responses, are deemed to be enough to trigger Article 31 rights. For example, a commander declares, "I don't know what you were thinking, but I'm assuming the worst," while shrugging his shoulders and shaking his head. Even though the commander has not asked a question, his statement and actions could be deemed as likely to elicit a response.

Who Must Provide Article 31 Rights Advisements

- Military supervisors and commanders are presumed to be acting in a disciplinary capacity when questioning a subordinate. Supervisors and commanders are held to a high standard. When in doubt, consult with your staff judge advocate (SJA) and err on the side of protecting the member's rights.

What Information Must the Article 31 Rights Advisement Include

- The crime the member is suspected of committing. The allegation stated must be specific enough so the suspect understands what offense he or she is being questioned about.
 - Legal specifications (articles under the UCMJ) are not necessary. Lay terms are sufficient.

- The general nature of the offense is sufficient (e.g., advising someone that they are suspected of “failing to report to work on time” is more specific than stating they are suspected of violating “Article 92 of the UCMJ”)
- Right to remain silent
- Consequences of making a statement
- Although it is not necessary that the advisement be verbatim, the best practice is to read the rights directly from the AFVA 31-231, *Advisement of Rights*, which is a wallet-size card with Article 31 rights advice for military personnel on one side and Fifth Amendment/*Miranda* rights for civilians on the other side (also attached at the end of this section)
- Although Article 31 does not include a right to counsel, that right is still provided by the Constitution so it is listed on the rights advisement card and should be included when reading Article 31 rights

Rights Advisement Must be Understood and Acknowledged by the Suspect

- Suspect Must:
 - Affirmatively acknowledge understanding of the rights;
 - Affirmatively waive their rights; and
 - Consent to make a statement without counsel present.
- The questioner cannot obtain consent by coercion, threats, or other deprivations of liberty designed to subvert the suspect’s rights
- Be cautious when advising an intoxicated person of his or her rights. If *significantly* under the influence of drugs or an intoxicant, the individual may be legally incapable of knowingly and voluntarily waiving his rights.
- If a suspect hesitates over whether or not to assert his or her rights, the best practice is to clarify whether or not the suspect will waive his or her rights and not ask any further questions until all doubt is resolved. Consult the SJA if it is unclear whether the suspect has waived.

Suspect Acknowledgement and Waiver of Article 31 Rights

- When possible, obtain the waiver in writing using AF Form 1168, *Statement of Suspect*
- Have a witness present
- If after electing to talk, a suspect changes their mind and decides to stop talking, **STOP ALL QUESTIONING!**

When to Stop Questioning

- If the individual indicates a desire to remain silent, stop questioning. This does not mean, however, that you cannot give the individual orders or directions on other matters.
- If the suspect requests counsel, stop questioning
 - Inform the SJA and get advice before re-initiating any questioning
 - No more questions can be asked until counsel is present, or there has been a sufficient break in custody (14 days) to permit the accused a meaningful opportunity to consult with counsel unless the suspect chooses to voluntarily reengage without pressure

Re-initiation of Questioning Following an Earlier Article 31 Rights Invocation

- There are three circumstances under which questioning may be re-initiated with a suspect following an earlier Article 31 rights invocation
 - The suspect voluntarily re-initiates the questioning
 - You are questioning the suspect about a different offense
 - There has been a sufficient “break in custody” to permit the accused a meaningful opportunity to seek/consult with counsel
 - Rule of Thumb: a 14 calendar day break in custody is sufficient. Prior to the preferral of charges, if there is a 14-day break between the initial rights invocation and the re-initiation of questioning, you are permitted to re-initiate questioning.
- Nonetheless, if a suspect has asserted their rights, it is best practice to not speak to that individual again regarding the offense in question unless you have consulted with the SJA

Documentation

- Try to get the statement in writing. A handwritten statement by a suspect is preferred, but also consider having the suspect complete the AF Form 1168 electronically, if reasonable under the circumstances
- Whether or not the suspect makes a written statement, prepare a memorandum for record after the session ends. The memorandum should include:
 - Where the session was held
 - What and when you advised the suspect
 - What the suspect said
 - What activities took place during the questioning (suspect sat, stood, smoked, drank, etc.)
 - What the suspect’s attitude was (angry, contrite, cooperative, combative, etc.)
 - Duration of the session with inclusive hours

REFERENCES

UCMJ art. 31

Military Rules of Evidence 304 and 305 (2019)

AFVA 31-231, *Advisement of Rights* (1 January 2019), certified current 1 July 2019

AF Form 1168, *Statement of Suspect/Witness/Complainant* (1 April 1998)

Rights Advisement for Military Suspects

I am _____ (grade, if any, and name), member of the (Air Force Security Forces/AFOSI). I am investigating the alleged offense(s) of _____ of which you are suspected. I advise you that under the provisions of Article 31 UCMJ, you have the right to remain silent, that is, to say nothing at all. Any statement you do make, either oral or written, may be used against you in a trial by court-martial or in other judicial, nonjudicial or administrative proceedings. You have the right to consult with a lawyer prior to any questioning and to have a lawyer present during this interview. You have the right to military counsel free of charge. In addition to military counsel, you are entitled to civilian counsel of your own choosing at your own expense. You may request a lawyer at any time during this interview. If you decide to answer questions, you may stop the questioning at any time. Do you understand your rights? Do you want a lawyer? (If the answer is yes, cease all questions at this point). Are you willing to answer questions?

Rights Advisement for Civilian Suspects

I am _____ (grade, if any, and name), a member of the (Air Force Security Forces/AFOSI). I am investigating the alleged offense(s) of _____ of which you are suspected. I advise you that under the Fifth Amendment to the Constitution you have the right to remain silent, that is, say nothing at all. Any statement you make, oral or written, may be used as evidence against you in a trial or in other judicial or administrative proceedings. You have the right to consult with a lawyer and to have a lawyer present during this interview. You may obtain a civilian lawyer of your own choosing, at your own expense. If you cannot afford a lawyer, and want one, one will be appointed for you by civilian authorities before any questioning. You may request a lawyer at any time during this interview. If you decide to answer questions, you may stop the questioning at any time. Do you understand your rights? Do you want a lawyer? (If the answer is yes, cease all questions at this point). Are you willing to answer questions?

CRIMINAL INDEXING

When Air Force and Space Force members are the subjects and suspects of criminal investigations, they are subject to indexing in several criminal databases. AFMAN 71-102, *Air Force Criminal Indexing*, imposes significant reporting obligations for commanders to ensure that proper criminal indexing is accomplished.

- Department of the Air Force Criminal Justice Information Cell (DAF-CJIC)
 - Entity responsible for criminal indexing. DAF-CJIC works closely with commanders, law enforcement personnel, and judge advocates to ensure compliance.
 - Composed of representatives from the Air Force Office of Special Investigations (AFOSI), Security Forces Office of Investigations (SFOI), and judge advocates
 - Oversees all expungement requests related to criminal indexing

Criminal History Reporting and Indexing:

- National Crime Information Center (NCIC): Administered by the Federal Bureau of Investigation (FBI), the NCIC is a clearinghouse for numerous criminal databases including the Interstate Identification Index (III), National Sex Offender Registry (NSOR), and the Protection Order File (POF)
- Interstate Identification Index (III): The III is a national index of criminal histories (arrest records or rap sheets) and electronic fingerprint records maintained by the NCIC.
 - Commander's responsibilities:
 - Coordinate with AFOSI and/or SFOI to ensure collection and submission of fingerprints and qualifying offense information for military members who are the subjects of a commander directed investigation (CDIs) or informal inquiry (not investigated by law enforcement), upon preferral of charges and after a probable cause determination is made by the serving staff judge advocate (SJA) or other legal advisor
 - Report administrative dispositions of offenses (e.g., no action, letters of counseling (LOC), reprimand (LOR), or admonition (LOA), and administrative discharges) to the case agent or investigator so that the disposition can be added to the III entry
 - Fingerprints of the following individuals will be collected for all offenses for which the law enforcement personnel, in consultation with the SJA or designee, has determined probable cause exists:
 - Regular Air Force (RegAF), Air Force Reserve (AFR), and Air National Guard (ANG) members on Title 10 status who are under investigation for offenses punishable by imprisonment listed in the punitive articles of the Uniform Code of Military Justice (UCMJ)
 - Civilians investigated (by AFOSI agents who have civilian arrest authority) for offenses under the United States Code (U.S.C.) punishable by imprisonment
 - Military members, their dependents, and Department of Defense (DoD) employees and contractors investigated by foreign law enforcement organizations for offenses punishable by imprisonment which are equivalent to the UCMJ or U.S.C. offenses
 - Fingerprints are not collected from minors unless the minor is subject to the UCMJ, emancipated, or collection is required to investigate a crime

- Probable cause is defined as reasonable grounds to believe that an offense has been committed and that the person to be identified as the offender committed it. Investigators must confer with a judge advocate before making a probable cause determination.
- Fingerprints are not submitted to III for non-serious offenses (e.g., drunkenness, vagrancy, disturbing the peace, violating curfew, and traffic violations (except vehicular manslaughter, driving under the influence (DUI), and hit and run offenses)). See Attachment 5 of AFMAN 71-102 for a list of offenses that are not considered serious or significant for this limited purpose.
- Impact of entry in III: Immediate creation of a national criminal history record that could affect or delay an individual's ability to purchase or receive a firearm and may hinder employment opportunities
- Expungement: Persons may apply for expungement of their III entries if there was no probable cause at the time of indexing to believe that they committed the offense or if the indexed offense did not qualify for indexing. They may request amendment if the charge/disposition is incorrect.
- National Sex Offender Registry (NSOR): The NSOR is a nationwide database of individuals who are required to register in a state, territorial, or tribal sex offender registry
 - Military members must register when convicted by a general or special court-martial of a sexually violent offense (e.g., rape, sexual assault, and abusive sexual contact) or certain offenses against minors (e.g., indecent acts or indecent language). For the complete list of offenses requiring registration, see DoDI 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, Enclosure 2, Appendix 4.
 - If the sentence includes confinement, the confinement facility must give notice to the appropriate sex offender registry, the investigating law enforcement agency (AFOSI or SFOI), and the U.S. Marshal Service prior to the member's release from confinement
 - If the sentence does not include confinement, the base legal office must give notice to the base confinement non-commissioned officer in charge (NCO) or designated personnel within 24 hours of the conviction, using the Statement of Trial Result (STR)
- Protection Order File (POF): The POF is a national database of court orders and military protective orders (MPOs) issued to prevent domestic violence, stalking, and harassment
 - Commander's Responsibilities:
 - Report issuance, extension, modification, or termination of an MPO within 24 hours to the primary law enforcement control center (law enforcement desk, base defense operations center (BDOC) or AFOSI if the primary law enforcement control center is not the Department of the Air Force). Commanders must be on G-series orders to issue an MPO.
 - Advise MPO-protected persons that MPOs are not enforceable by civilian authorities and to consider seeking a civilian protection order (CPO) from civilian authorities
 - If advised of CPO issuance, notify primary law enforcement control center within 24 hours
 - Impact of entry in POF: Civilian law enforcement will be aware of MPOs and can notify military authorities of off-base violations. MPOs are not enforceable by civilian authorities.
 - No contact orders cannot be entered into the POF as they are not enforceable by civilian authorities and civilian authorities will be unaware of them

- Combined Deoxyribonucleic Acid (DNA) Index System (CODIS): Managed by the FBI, the CODIS is a nationwide database of DNA samples collected from persons under investigation, used to make positive identifications and provide evidence to solve crimes
 - Commander's responsibilities:
 - Coordinate with law enforcement to ensure collection of DNA sample upon preferral of charges, following a CDI or informal inquiry for qualifying offenses identified in DoDI 5505.14, *Deoxyribonucleic Acid (DNA) Collection Requirements for Criminal Investigations, Law Enforcement, Corrections, and Commanders*, Enclosure 3
 - Coordinate on expungement requests by current military members. Commander must be O-4 or above.
 - DNA samples typically are collected at the same time as fingerprints, based on a probable cause standard, when military members are under investigation for qualifying offenses. *See* DoDI 5505.14, Enclosure 3. Agents must coordinate with a judge advocate before making a probable cause determination.
 - AFOSI and Security Forces collect and submit DNA samples to the United States Army Criminal Investigation Laboratory (USACIL) which analyzes the DNA and submits the results to the FBI for entry in the CODIS
 - Security Forces personnel and military AFOSI agents do not have civilian arrest authority and therefore lack the authority to collect DNA samples from civilians
 - DNA samples are not collected from minors
 - If not collected during the investigation, DNA must be collected by AFOSI or Security Forces when a military member is ordered into pretrial confinement or when a military member is confined following a conviction at a general or special court-martial
 - Impact of entry in CODIS: Member's DNA is subject to comparison with other DNA profiles used to solve crimes and link serial offenders
 - Expungement: Current and former military members, not convicted of any offense at a general or special court-martial, may request expungement of their entry in the CODIS. Current military members submit their requests to DAF-CJIC. Former military members submit their requests to the Clerk, Air Force Court of Criminal Appeals. Civilians submit their requests to USACIL.
- National Instant Criminal Background Check System (NICS): The NICS is a national database maintained by the FBI of persons who are prohibited from shipping, transporting, receiving and possessing firearms, ammunition, and explosives (also known as "prohibited persons")
 - Categories of prohibited persons:
 - Persons who have been convicted in any court of a crime punishable by imprisonment for a term exceeding one year (or a misdemeanor punishable by imprisonment over two years). "Punishable" means potential, not actual, sentence to confinement.
 - Fugitives from justice (a person who has fled from any state to avoid prosecution or to avoid giving testimony in a criminal proceeding). Deserters are not fugitives unless the Department of the Air Force can prove they have fled the state.
 - Persons who are unlawful users of, or addicted to, any controlled substance. This category includes military members who, without medical authorization, have positive drug tests or possess, or admit to possession of, controlled substances.

- Persons adjudicated as mental defectives, including persons found insane by a court in a criminal case, persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility, and persons committed to mental institutions
- Persons discharged from the military with a dishonorable service characterization
- Persons who have renounced their U.S. citizenship
- Persons convicted in any court of a misdemeanor crime of domestic violence (involving the use or attempted use of physical force or threatened use of a deadly weapon committed by a current or former spouse, parent, or guardian, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent or guardian, or a person similarly situated)
- Persons under indictment or information for a crime punishable by imprisonment for a term exceeding one year
- Persons who are aliens and illegally in the United States
- Persons who are subject to a qualifying protection or restraining order (not MPO)
- Commander's responsibilities:
 - Notify military members under their command via AF Form 177, *Notice of Qualification for Prohibition of Firearms, Ammunition, and Explosives*, when they are identified as meeting the qualifications for NICS prohibitions
 - Distribute AF Form 177 in accordance with paragraph 4.6.5 of AFMAN 71-102. Specifically, the commander will provide a copy of the completed AF Form 177 to DAF-CJIC within 24 hours via email (daf.cjic@us.af.mil) and a courtesy copy to the servicing legal office. The commander will likewise forward the original and signed AF Form 177 to DAF-CJIC and provide copies to the member, servicing legal office, investigator (AFOSI or Security Forces), and the member's defense counsel, if applicable.
 - Report all subjects who meet NICS prohibitions to DAF-CJIC within one duty day of commencing a CDI or informal inquiry and coordinate with AFOSI or Security Forces for collection of fingerprints and DNA for all subjects of CDIs or informal inquiries
 - Refer to AFOSI or Security Forces any matter which is referred to court-martial, so that a criminal case may be opened and criminal indexing accomplished
 - Report to DAF-CJIC when military members are adjudicated as mental defectives or committed to a mental institution, not related to a court-martial
- Impact of entry in NICS: Immediate denial of individual's ability to obtain a firearm
- Defense Central Index of Investigations (DCII): The DCII is a database of investigations conducted by DoD investigative agencies such as AFOSI and Security Forces which is accessible for use in criminal and security clearance investigations
 - Commander's responsibilities: AFOSI and Security Forces commanders must ensure DCII entries are made for all investigations
 - Entries must be based on credible information that the subject of the investigation committed an offense. Victims may also be entered in DCII.

- Credible information is defined as information disclosed to or obtained by the investigator that, considering the source and nature of the information and the surrounding circumstances, reasonably warrants further investigation to determine whether a criminal act did or may have occurred and is sufficiently believable to indicate criminal activity has occurred
- Expungement: Once an entry is made, it may only be removed based on mistaken identity or a finding that credible information was lacking at the time of indexing

REFERENCES

Unlawful Acts, 18 USC § 922(d)

AFMAN 71-102, *Air Force Criminal Indexing* (21 July 2020)

DoDI 1325.07, *Administration of Military Correction Facilities and Clemency and Parole Authority* (11 March 2013), incorporating Change 4, 19 August 2020

DoDI 5505.14, *Deoxyribonucleic Acid (DNA) Collection Requirements for Criminal Investigations, Law Enforcement, Corrections, and Commanders* (22 December 2015), incorporating Change 1, 9 March 2017

AF Form 177, *Notice of Qualification for Prohibition of Firearms, Ammunition, and Explosives* (30 July 2020)

INSPECTIONS AND SEARCHES

Military law authorizes a commander to direct inspections of persons and property under his or her command and to authorize probable cause searches and seizures of persons and property under his or her command. However, a commander who authorizes a search or seizure must be neutral and detached from the case and facts. Therefore, the command functions of gathering facts and maintaining overall military discipline must remain separate from the legal decision to grant search authorization.

A commander should also know the difference between inspections/inventories versus searches/seizures. Inspections/inventories do not require probable cause, are usually authorized by individual commanders, and are intended for non-prosecutorial reasons. Searches/seizures do require probable cause and are intended to obtain evidence for disciplinary reasons. Understanding this distinction will help ensure crucial evidence can be introduced at trial.

The law governing searches, seizures, and inspections is nuanced and fluid. Due to the dynamic nature of this area of the law combined with the myriad legal considerations and technical details, which often depend on specific facts and circumstances, commanders and military magistrates are strongly advised to seek the advice of the servicing staff judge advocate (SJA) office prior to making any decisions on a search, seizure, or inspection.

Key Terms

- Searches: Examinations of a person, property, or premises, for the purpose of finding evidence for use in trial by court-martial or in other disciplinary proceedings
- Seizures: The meaningful interference with an individual's possessory interest in property, usually by taking and withholding the property
- Inspections: Examinations of a person, property, or premises for the *primary* purpose of determining and ensuring the security, military fitness, or good order and discipline of your command
- Inventories: Administrative actions that account for property entrusted to military control
- Apprehension: The taking of a person into custody

Searches

- A search may be authorized on the following people and things:
 - Persons subject to military law and under the commander's command
 - Persons or property situated in a place under the commander's command and control
 - Military property or property of a nonappropriated fund instrumentality (NAFI)
 - Property situated in a foreign country which is owned, used, occupied by, or held in the possession of a member of your command
- A search may be authorized for the following types of evidence:
 - Contraband unauthorized or prohibited property (e.g., drugs)
 - Fruits of a crime (e.g., stolen property, money, etc.)
 - Evidence of a crime (e.g., bloody clothing, weapon, fingerprints, bodily fluids, etc.)

Probable Cause Searches

- As a general rule, probable cause is required before a commander, a military judge, or magistrate can legally authorize a search
 - Probable cause exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched
 - Probable cause may arise from your personal knowledge or hearsay/third party knowledge (or both), and may come from oral or written evidence (or both)
 - The search authority will make a decision based on the “totality of the circumstances,” i.e., believability of information and specific known facts
 - An anonymous telephone call, by itself, does not justify a probable cause search, but can if it has enough indicia of reliability and specifics to indicate personal knowledge
 - When relying on military working dogs to establish probable cause, the search authority should be aware of the dog’s successful training exercises as well as the dog’s actual record of success in similar search situations
 - While not legally required, when a commander requests a search authorization, a witness should swear to the information used in finding probable cause. Commanders and judge advocates are authorized to administer oaths or affirmations for these purposes.
- A commander may orally authorize a search/seizure when exigent circumstances exist and there is a reasonable belief that a delay in obtaining authorization would result in the removal, destruction, or concealment of the property or evidence sought. Probable cause is still required and it should be later recorded in writing.

Mechanics of a Search Request

- Refer the source of information to Security Forces who will investigate or refer to Air Force Office of Special Investigations (AFOSI)
- Do not personally investigate to avoid becoming personally involved in the matter
- If the commander learns of information which may justify a search:
 - “Freeze” the situation (i.e., control access to the area to be searched, if within the commander’s control, so that the scene and potential evidence remain undisturbed)
 - Immediately notify Security Forces Office of Investigations (SFOI) or AFOSI
 - Note any incriminating evidence or statements
 - Coordinate with the legal office

Exceptions to Probable Cause Searches

- A search authorization is not required for the following searches:
 - Consent Searches:
 - It is best practice to ask for the consent from the individual whose person or property is to be searched, even if the search authority has authorized a search. If a judge later rules that the search authorization was somehow improper, discovered evidence may still be admitted at trial if the individual consented to the search.
 - Consent must be voluntary
 - Consent cannot result from threats, coercion, or pressure. The best practice is to have a third person present as a witness.

- Mere acquiescence to a search is not sufficient to justify a consensual search. Consent must be clearly given and voluntary.
- Consent may be orally given or in writing. Written consent is preferred. When possible, use AF Form 1364, *Consent for Search and Seizure*.
- The individual giving consent must have either an exclusive or joint interest in the premises or property to be searched
 - An assigned occupant of a dormitory room can consent to a search of the joint or common areas of the room, or areas they have normal use and control over
 - Only the individual who has the exclusive use of a separate closet, locker, or other part of the premises may consent to a search of those areas
 - If a suspect occupant **is present** and does not consent, but a co-occupant who is also present consents, the “consent” from the co-occupant is **not valid** as to the suspect occupant. In other words, you cannot subvert a suspect’s denial of consent to search joint/common areas if the suspect is present by obtaining consent from co-occupants.
- Border Searches:
 - Searches upon entry to, or exit from, U.S. installations, enclaves, aircraft, or vessels that are outside the United States
- Government Property: Searches of government property not issued for personal use where there is no reasonable expectation of privacy in the item or location. Property that is commonly issued for personal use includes: dorm rooms, lockers, and housing.
- Searches within jails, confinement facilities, or other similar facilities
- Searches incident to a lawful stop or apprehension
- Other searches as deemed valid under the Constitution and case law, such as an emergency search to save life, searches of open fields or woodlands, searches of trash, etc.

Special Search Issues

- Computer Searches:
 - Computer users have a reasonable expectation of privacy in computer files stored on personal computers, personal cell phones, and in personal mass data storage devices
 - To search personal computer files or storage devices, one must obtain either authorization based on probable cause, or consent
 - A person may have a reasonable expectation of privacy in some aspects of government computers, networks, storage devices, and e-mails. The law in this area is complex — consult your legal office in **every** instance.
 - Network administrators who discover evidence of misconduct on a users’ account while performing network maintenance should disclose that information to law enforcement or the commander
- Searches of Privatized/Leased Housing:
 - *On-Base Housing*: The installation commander and the military magistrate normally have power to authorize searches of housing located on the installation

- *On-Base Privatized Housing*: Under the Military Housing Privatization Initiative (MHPI), the military leases land to private developers who are responsible for housing construction, and upkeep. The issue centers on whether the installation commander retains sufficient control over family housing when housing is leased to a private entity — especially on bases with concurrent jurisdiction. Due to the sensitive nature of the privacy rights involved, it is essential to consult with the legal office in **every** instance.
- *Off-Base Housing*: Normally commanders do not have sufficient control over leased housing outside the installation to allow them to authorize searches absent consent. Commanders should review the lease agreement and consult with the legal office.

Inspections

- Generally: An “inspection” is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command, the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle
 - Inspections are not searches. If an inspection is made for the primary purpose of obtaining evidence for use in trial by court-martial or in other disciplinary proceedings, it is an impermissible inspection and any evidence obtained thereby could be excluded at trial. An inspection cannot be used as subterfuge for a legitimate search/seizure.
 - Inspections may be “announced” or “unannounced” and may be authorized without probable cause
 - Inspections may be conducted personally by the commander or by others at the commander’s direction
- Methods of Conducting Lawful Inspections:
 - Inspections must not be for the primary purpose of obtaining evidence for use in courts-martial or in disciplinary proceedings. The best practice is to have the commander prepare a memorandum for record concerning the purpose of the inspection so that they may refresh their memory if later called upon to testify about the inspection.
 - Inspections must be conducted in a “reasonable manner”
 - An inspection is “reasonable” if the scope, intensity, and manner of execution of the inspection is reasonably related to its purpose. For example, if the purpose of an inspection is to look for fire hazards near office electrical outlets, inspecting the contents of the desk drawers would probably be unreasonable since items located in the desk drawers would not risk an electrical fire. The inspection will have gone beyond the scope of the purpose of the inspection.
- Inspections for Weapons and Contraband: Inspections for weapons or contraband are specifically permitted while conducting a previously scheduled lawful inspection as long as the examination was not targeted toward specific individuals or employing substantially different intrusion methods and not directed immediately following a report of a specific offense within the unit, organization, or installation
 - Contraband, weapons, or other evidence of a crime that is uncovered during a proper inspection may be seized and are admissible in a court-martial

- An inspection that turns up contraband should continue as planned. Commanders who abandon inspections upon the discovery of contraband risk creating the appearance that the inspection was a search in disguise. The command should contact law enforcement, but otherwise proceed with the search once the area is secure.
- An examination for the primary purpose of obtaining evidence for use in disciplinary proceedings is not an “inspection.” It is a “search” and, if not authorized based on probable cause, it is *illegal*.
- Examples of Lawful Inspections:
 - Air Force or Space Force random urinalysis inspection program
 - Unit or base-wide “dorm sweeps” (ordered by installation or unit commander)
 - “Unit urinalysis sweep” (urinalysis testing of all or part of a unit on a predesignated day)
 - “Operation Nighthawk” (selection of random individuals for urinalysis entering the installation in the late evening or early morning hours of a pre-designated day)
 - **Consult with your local SJA for implementation instructions for an inspection**

Inventories

- Inventories may be conducted for valid administrative purposes including:
 - Furniture inventories of dormitories or dormitory rooms
 - Inventories of an absent without leave (AWOL) member or a deserter’s property left in a government dormitory room. Commanders should consult their servicing legal office in these cases.
 - Inventories of the contents of an impounded or abandoned vehicle
 - Routine inventories of a unit’s equipment (sometimes conducted prior to field training exercises or movement)
- Unlawful weapons, contraband, or other evidence may be lawfully seized during a valid inventory

Unfit to Perform Duties & Blood Alcohol Tests

- A blood alcohol test (BAT) is not required to prove a member to be incapacitated for the performance of their duties by prior wrongful indulgence in alcohol or drug use
- Voluntary BATs:
 - You may, after consultation with your local legal office, ask a member of your command who is suspected of being under the influence of alcohol or drugs to voluntarily take a BAT
 - Follow procedures of local hospital/clinic laboratory
- Involuntary BATs:
 - Although commanders have authority over subordinate members within their units, BAT tests are normally directed by a search authorization based on probable cause
- Implied Consent for Alcohol Tests:
 - Drivers give implied consent to tests of their blood, breath, and/or urine for alcohol or drugs when driving on base
 - Invoked by security forces regulations governing driving under the influence (DUI) offenses

- Often results in automatic adverse action for refusal to cooperate and/or loss of on base driving privileges
- Physician Authorized:
 - For medical reasons directed by an examining physician
 - Results may be used criminally

Use of Military Working Dogs in Searches and Inspections

- Military working dogs may be used at any time in common areas since there is no reasonable expectation of privacy in a common area
- Common areas include dormitory hallways, day rooms, parking lots, and duty sections
- Military working dogs may be used during inspections anywhere within the scope of the inspection (e.g., dormitory rooms), whether the occupant is present or not
- What to do when a military working dog “alerts” in a common area
 - Can immediately “search” all *common* areas for contraband
 - If it appears the “alert” in a common area is on contraband but in a non-common area, for example, outside a dormitory room or automobile, immediately call the search authority to obtain a search authorization before proceeding further with the search
- What to do when a drug dog “alerts” during an inspection
 - Immediately stop the inspection in the area of the dog alert (e.g., that particular dormitory room, and secure that area)
 - Call the search authority and obtain a search authorization before proceeding with the inspection or a search in that particular area
 - After the search of that particular area has been completed pursuant to a search authorization, continue the inspection

REFERENCES

Art. 31, UCMJ

The Military Housing Privatization Initiative, 10 U.S.C. §§ 2871-2885

Military Rules of Evidence 311-317 (2019)

AFI 31-218, *Motor Vehicle Traffic Supervision* (22 May 2006), including AFI31-218_AFGM2016-01, 4 October 2016, certified current 14 July 2017

AFI 31-121, *Military Working Dog Program* (2 May 2018), including AFI31-121_AFGM2020-01, 15 September 2020

AFI 31-218(I), *Motor Vehicle Traffic Supervision* (22 May 2006), certified current 15 July 2011, including AFI31-218_AFGM2016-01 (4 October 2016)

AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_DAFGM2021-01, 5 January 2021

AF Form 1364, *Consent for Search and Seizure* (5 August 2019)

INQUIRY OR INVESTIGATION INTO REPORTED OFFENSES

Commanders may learn about allegations against their members in a variety of different ways. Regardless of how and when the commander learns about an allegation, when a military member is accused or suspected of an offense, the member's immediate commander has primary responsibility for ensuring an inquiry or investigation is conducted by appropriate personnel and that appropriate command action is taken.

Initial Investigation of Suspected Offenses

- Minor Offenses: In some cases, (e.g., failure to go, dereliction of duty), the chain of command or first sergeant may conduct the inquiry. The commander may also consider a commander directed investigation (CDI) to have a neutral individual assess the situation.
- Major Offenses: In more serious cases, law enforcement agents such as the Security Forces Office of Investigations (SFOI) or the Air Force Office of Special Investigations (AFOSI) will conduct the investigation and report the results to the commander for disposition of the case. All allegations of a sexual nature or drug distribution must be referred to AFOSI for investigation.

Options Available to the Commander

- Once the commander has all of the relevant facts necessary to make a decision, he or she should consider what action, if any, should be taken, and should do so in a timely manner
 - In cases involving a potential disciplinary action or a criminal offense, the commander should consult with the local legal office
 - Ordinarily the immediate commander of a person accused or suspected of committing an offense determines the appropriate initial disposition. Sexual offenses may have different disposition requirements. See "Command Response to Sexual Offenses"
- Potential actions the commander may take include:
 - No action
 - Administrative action (e.g., letter of reprimand (LOR), removal from supervisory duties, involuntary discharge, denial of reenlistment, etc.)
 - Nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ)
 - Preferral of court-martial charges
 - At the time of preferral of charges, the accuser is required to take an oath that he or she is familiar with facts underlying the charges and believes the charges to be supported by the evidence

REFERENCES

Rules for Courts-Martial 303 and 306 (2019)

SecDef Memorandum, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases* (20 April 2012)

Manual for Courts-Martial, United States, Appendix 2.1, *Non-Binding Disposition Guidance* (2019)

PREPARATION, PREFERRAL, AND PROCESSING OF CHARGES

The preparation of court-martial charges involves drafting the charges and specifications. Preferral of charges in the military is the act of formally accusing a military member of a violation of the Uniform Code of Military Justice (UCMJ). Processing of the charges involves forwarding the charges and specifications to a convening authority.

Preparation of Charges

- The charge states which article of the UCMJ the member is alleged to have violated
 - The specification is a concise statement of exactly how the member allegedly violated the article
 - Since precise legal language is required, the legal office drafts charges and specifications
 - Charges are documented on the DD Form 458, *Charge Sheet*

Preferral of Charges

- The first formal step in initiating a court-martial
- Anyone subject to the UCMJ may prefer charges against another person subject to the UCMJ, though the immediate commander of an accused is the individual who ordinarily prefers charges
- Preferral requires the “accuser,” the one preferring the charge, to take an oath that he or she is a person subject to the UCMJ, that he or she either has personal knowledge of or has investigated the charge and specification, and that the charge(s) and specification(s) are true to the best of his or her knowledge and belief
 - This oath is normally given by a judge advocate
 - An accuser is not required to believe a charge and specification can be proven beyond a reasonable doubt

Processing of Charges

- Preferral does not require the presence of the accused. However, after preferral, the commander must inform the accused of the charge. Since the commander is normally the accuser, notice to the accused typically occurs at the same time as preferral by the commander reading the charge to the accused.
- The commander then forwards the charge with an indorsement memorandum to the summary court-martial convening authority (SCMCA)
- To convene a court-martial, the charge must be forwarded to a convening authority, usually the special court-martial convening authority (SPCMCA). In the Department of the Air Force, the SCMCA is usually also the SPCMCA, so this extra step of forwarding the charge from the SCMCA to the SPCMCA is not required.
- The SPCMCA can dismiss the charges or return the charges to the commander for alternate disposition. If the SPCMCA determines the charges warrant a court-martial, the following actions may be taken:
 - Refer the charge to a special court-martial or summary court-martial; or
 - Appoint a preliminary hearing officer (PHO) to conduct an Article 32 preliminary hearing

- The PHO completes and forwards the preliminary hearing report to the SPCMCA for review. If the SPCMCA believes a general court-martial is warranted, the SPCMCA forwards the preliminary hearing report along with the preferred charges to the general court-martial convening authority (GCMCA) for review and possible referral to a general court-martial.
- The GCMCA can refer the charges to a general, special, or summary court-martial and convene the court-martial, return the charges to the SPCMCA for disposition, or dismiss the charges
- Once the charge has been referred to trial, the appointed trial counsel will then formally serve the accused with a copy of the charges and specifications
- Time constraints are involved in the processing of court-martial charges. An accused's right to a speedy trial and the impact that unnecessary delay can have on the effectiveness of military justice require charges be disposed of promptly.

REFERENCES

UCMJ art. 30

Rules for Courts-Martial 306 and 307 (2019)

AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_DAFGM2021-01, 5 January 2021

DD Form 458, *Charge Sheet* (May 2000)

Manual for Courts-Martial, United States, Appendix 2.1, *Non-Binding Disposition Guidance* (2019)

PRETRIAL RESTRAINT AND CONFINEMENT

Pretrial restraint and pretrial confinement are tools to ensure the appearance of the accused at their upcoming court-martial and/or to prevent the commission of serious misconduct by the accused while awaiting court-martial. There are four types of pretrial restraint: (1) conditions on liberty; (2) restriction in lieu of arrest; (3) arrest; and (4) pretrial confinement. Pretrial restraints are not required in every court-martial case. Before ordering any form of pretrial restraint, the commander must be convinced that probable cause establishes that: (1) a violation of the Uniform Code of Military Justice (UCMJ) was committed; (2) the accused committed it; and (3) the restraint imposed is required by the circumstances to either ensure the presence of the accused at court-martial, or to prevent foreseeable serious criminal misconduct by the accused while pending court-martial. Pretrial restraint/confinement is not intended to be, and should not be used as, pretrial punishment. Pretrial restraints should only be imposed in association with pending court-martial charges. Most pretrial restraints triggers a speedy trial clock under Rules for Courts-Martial (RCM) 707 and commanders must notify the legal office anytime he or she considers imposing limits on an Airman or Guardian's liberty.

Overview

- Pretrial Restraint: moral or physical restraint on a person's liberty, imposed before and during disposition of court-martial level offenses
- Pretrial Confinement: physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges
 - Pretrial confinement is the most severe form of pretrial restraint
 - There is no "bail" in the military justice system, therefore placement into pretrial confinement requires a series of procedural safeguards requiring the government to ultimately demonstrate, by a preponderance of the evidence (i.e., more likely than not), that pretrial confinement is necessary under the circumstances
- Commanders should select the least rigorous restraint necessary to assure appearance of an accused at court-martial or prevent commission of foreseeable serious misconduct pending court-martial
- Never impose any form of pretrial restraint without first consulting the legal office
- The imposition of pretrial restraint in the form of restriction in lieu of arrest, arrest, or pretrial confinement starts the speedy trial clock under RCM 707 (120 days), regardless of whether charges have been preferred

Who May Order Pretrial Restraint

- Only a commander in the Airman or Guardian's chain may impose pretrial restraint on an officer. This authority **MAY NOT** be delegated.
- Any commissioned officer may impose pretrial restraint on any enlisted person
- A commanding officer can delegate authority to order pretrial restraint of enlisted personnel under their command to non-commissioned officers (usually the first sergeant)

Pretrial Restraint Prerequisites

- Requires a reasonable belief that:
 - An offense triable by court-martial has been committed;
 - The person to be restrained committed it; and
 - Restraint is required by the circumstances

- Notice to Individual: Restrained individual must be personally notified of the nature of the offense which is the basis for the restraint and terms of the restraint. Individuals placed into pretrial confinement must also be notified of the right to remain silent, the right to counsel, to the procedures involved, and how the review will occur.
- Release from Pretrial Restraint: Except as otherwise provided by RCM 305, a person may be released from pretrial restraint by any person authorized to impose the restraint

Types of Pretrial Restraint

- There are four types of pretrial restraint (listed from least to most severe):
- Conditions on Liberty: Imposed by orders directing a person to do or refrain from doing specified acts
 - May be imposed in conjunction with other forms of restraint or separately
 - Typical examples include orders to report periodically to a specified official, orders not to go to a certain place, and orders not to associate with specified persons
- Restriction in lieu of Arrest: Imposed by ordering a person to remain within specified limits
 - Normally restriction is to remain within the confines of the base
 - A restricted person shall, unless otherwise directed, perform full military duties
- Arrest: The restraint of a person, directing the person to remain within specified limits
 - An arrested person does not perform full military duties
- Pretrial Confinement: Most severe type of pretrial restraint; see requirements below

Procedures Upon Entry Into Confinement

- Placement into pretrial confinement requires additional procedural safeguards to ensure that it is both necessary and justified under the circumstances, including the following four levels of review over the course of the first week of any pretrial confinement:
 - 24-hour commander notification
 - 48-hour probable cause review by a neutral officer
 - 72-hour commander review of necessity of continued pretrial confinement
 - 7-day hearing conducted by a neutral pretrial confinement reviewing officer
- Upon placement into pretrial confinement, the person to be confined must be promptly notified of the following:
 - Nature of the offenses for which he or she is being held
 - Right to remain silent and that any statement made may be used against him or her
 - Right to request assignment of military counsel or retain civilian counsel at no expense to the United States
 - Procedures by which pretrial confinement will be reviewed
- Article 10, UCMJ, requires that “immediate steps” be taken to try the person or to dismiss the charges and release the person (usually requiring government to bring accused to trial within 120 days)

24-Hour Notification

- If the person ordering confinement is not the confinee's commander, then the confinee's commander must be notified within 24 hours of the entry to confinement

48-Hour Probable Cause Determination

- Within 48 hours of entry into confinement, a neutral and detached officer must review the adequacy of probable cause to continue confinement by considering the following:
 - Nature and circumstances of the suspected offense
 - Weight of the evidence against the accused
 - Accused's ties to the local community, including family, off-duty employment, financial resources, and length of residence
 - Accused's character and mental condition
 - Accused's service record
 - Accused's record of appearance or flight from similar proceedings
 - Likelihood the accused will commit further serious misconduct if not confined
 - Effectiveness of lesser forms of restraint
- If the commander is neutral and detached and acts within 48 hours, the provision calling for a 48-hour probable cause determination will be satisfied by the 72-hour commander review discussed below. However, if the commander is not neutral and detached, another officer must make the 48-hour probable cause determination.

72-Hour Commander Review

- If confinement is continued, within 72 hours of entry into confinement, the confinee's commander must prepare a written memorandum justifying continued confinement
 - Continued confinement is warranted if the commander has a reasonable belief that:
 - Offense triable by court-martial has been committed
 - Confiner committed it
 - Confinement is necessary because it is foreseeable that:
 - Confiner will not appear at trial; or
 - Confiner will engage in further serious criminal conduct; and
 - Less severe forms of restraint are inadequate
- It is not necessary to try lesser forms of restraint, but they **MUST** be considered in determining whether confinement is appropriate (i.e., commanders should not order someone into pretrial confinement until they have considered whether a lesser restraint would accomplish the task)
- Convenience of the unit or suicide prevention of the accused are **NOT** valid reasons for pretrial confinement

7-Day Pretrial Confinement Review

- A reviewing officer must make written findings, within seven days of entry into confinement, whether the confinee shall be released or remain confined
- Reviewing officer must be neutral and detached

- Pretrial confinement review officer (PCRO) may be, with limited exception, a member appointed by the convening authority;
- A military magistrate appointed by the convening authority; or
- A military judge, although it is unusual for a judge to conduct initial review of pretrial confinement unless it is after referral of charges
- The PCRO must review the commander's 72-hour memorandum to determine whether the requirements for pretrial confinement are met
- The PCRO shall consider matters submitted by the confinee, and, unless overriding circumstances or time constraints dictate otherwise, shall allow the confinee and counsel an opportunity to appear and present a statement or evidence at the hearing
- A representative of command, such as the commander, first sergeant or other person, may also appear before the hearing officer
- The review is not an adversarial proceeding. The confinee and counsel have no right to cross examine witnesses, although this is customarily permitted.
- The PCRO's memorandum is forwarded to convening authority who may only override decision to continue pretrial confinement. Reviewing officer's decision to release may not be reversed without new evidence. A member's commander may, however, impose lesser forms of pretrial restraint.
- Confinées usually receive day-for-day credit for pretrial confinement against any confinement adjudged by the court. Credit for unlawful pretrial confinement, including pretrial punishment, or for restriction tantamount to confinement may lead to additional credit.

No Pretrial Punishment of Pretrial Confinées

- Pretrial confinées **MAY NOT** be treated the same as sentenced prisoners, such as being required to wear special uniforms for sentenced prisoners, perform punitive labor, or undergo punitive duty hours
- Whether a particular condition amounts to pretrial punishment is a matter of the intent of the official imposing the condition or of the purposes served by the condition, and whether such purposes are reasonably related to a legitimate governmental objective. However, unduly rigorous circumstances or excessive conditions may give rise to a permissive inference that a particular condition constitutes punishment.
- Pretrial punishment includes public denunciation and degradation
- Commingling pretrial and sentenced prisoners, without more, is not automatically considered pretrial punishment

Review by Military Judge

- Once charges are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief made by the defense. Before referral of charges, the accused or counsel may request release from pretrial confinement or modification of other forms of restraint from the convening authority.
- The remedy for non-compliance with pretrial confinement rules (e.g., review by neutral and detached person is not made within 48 hours) or abuse of discretion can range from additional credit for each day of illegal confinement to dismissal of the charges

REFERENCES

UCMJ arts. 10, 12, and 13

Rules for Courts-Martial 304, 305, 707 (2019)

AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_DAFGM2021-01, 5 January 2021

TRIAL FORMAT

In most courts-martial, a military accused may elect to be tried by a military judge alone or by a panel of court members (the military equivalent of a civilian jury). All panel members must be senior in rank to the accused. In either case, the trial will consist of two major portions: (1) findings (guilt/innocence determination) and, in the event of a conviction at findings, (2) sentencing.

Types of Court-Martial

- Summary Court-Martial:

- The least severe court-martial. A finding of guilty at a summary court-martial does not result in a federal conviction.
- Presided over by a commissioned officer who may be a commander or a neutral judge advocate who is not affiliated with the legal office. Summary courts-martial are not typically presided over by a military judge.
- Maximum authorized sentence:
 - For enlisted members E-4 and below: one month of confinement, forfeiture of two-thirds of member's pay per month for one month, and reduction to the grade of E-1
 - For enlisted members E-5 and above: forfeiture of two-thirds of member's pay per month for one month, reduction to the next lower grade, and restriction to certain limits for two months

- Military Judge Alone Special Court-Martial

- Presided over by a military judge alone and there are no panel of members
- Maximum authorized sentence: six months of confinement. A punitive discharge is not authorized.
- Under certain circumstances, an accused may object to being tried in this forum

- Special Court-Martial:

- The panel is composed of four members
- Maximum authorized sentence:
 - For enlisted members: one year of confinement, forfeiture of two-thirds of member's pay per month for one year, reduction to the lowest enlisted grade (E-1), and a bad conduct discharge (BCD)
 - Officers and cadets may not be sentenced to confinement or dismissed from the service by a special court-martial. For this reason, officers and cadets are rarely tried at a special court-martial.

- General Court-Martial:

- The panel is composed of 8 members (12 members in capital cases)
- Maximum authorized sentence at a general court-martial includes death or life without the possibility of parole, total forfeiture of a member's pay and allowances, and a dishonorable discharge for enlisted members or a dismissal for officers

Findings

- Findings is the first part of the trial during which guilt or innocence is determined. An accused may plead guilty or not guilty.
- Guilty Plea:
 - Following a member's plea of guilty, the detailed military judge questions the accused under oath to make sure he or she understands the meaning and effect of his or her plea of guilt
 - If the military judge accepts the guilty plea, the accused will then be sentenced by the military judge, or a panel of members, whichever the accused elects
- Not Guilty Plea:
 - *Forum Choice*: An accused elects the forum that determines his or her guilt. The types of forum depend upon the accused's status as officer or enlisted.
 - Enlisted Accused: An enlisted accused may elect trial by one of the following methods:
 - military judge alone; (2) officer members; (3) mixed panel of officer and enlisted members (at least one-third enlisted members included on the court-martial panel, all of whom must be senior in rank to the accused)
 - Officer Accused: (1) military judge alone; (2) officer members (all of whom must be senior in rank to the accused)
 - Trial by military judge alone is not allowed in capital cases
 - The accused is presumed innocent of all charges
 - The prosecution proceeds with their case first, calling witnesses and presenting evidence, and they must prove the accused's guilt beyond a reasonable doubt in order to secure a conviction
 - Once the prosecution has finished, the defense has an opportunity to present their case. An accused has an absolute right to remain silent and present no evidence. The accused may also choose to testify or present other evidence in his or her defense.
 - If the defense presents a case, the prosecution has the opportunity to offer evidence or call witnesses in rebuttal. If the prosecution puts on a rebuttal case, the defense may offer evidence or call witnesses in surrebuttal.
 - *Court-Martial Panel Voting – Non-Capital Cases*: In a trial with members, three-fourths of the members, voting by secret written ballot, must concur in any finding of guilty
 - *Court-Martial Panel Voting – Capital Cases*: In order to sentence the accused to death in a capital case, the vote of guilty on findings must be unanimous

Sentencing

- Second part of the trial if a member is found guilty of any offense during the findings portion. In this stage, an appropriate punishment is determined.
 - Unlike many civilian courts, sentencing normally occurs immediately following findings
 - Sentencing may be by military judge alone or a panel of members
 - If an accused elects trial before military judge alone for findings, then the accused will be sentenced by the military judge

- If an accused elects trial before members, then, at sentencing, the accused can choose to have the same panel of members adjudge the sentence or elect to have the sentence determined by the military judge alone
- Sentencing is an adversarial process that usually includes the presentation of evidence and may involve witnesses
 - Prosecution can present matters in aggravation or show lack of rehabilitation and can rebut evidence the accused presents
 - Defense can present matters in extenuation to explain the circumstances surrounding the commission of the offense and/or matters in mitigation to lessen the punishment to be adjudged by the court-martial
 - As in the findings portion of trial, the accused also has an absolute right to remain silent and present no evidence during sentencing. In addition, the accused may elect to make a statement that is not offered under oath, known as an “unsworn statement.”
 - A crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at a sentencing hearing relating to that offense, which can include an unsworn statement
- In sentencing by members, three-fourths must concur, voting by secret written ballot, in any sentence, except that a unanimous vote is required when the sentence includes death

REFERENCE

Rules for Courts-Martial 201, 903, 910, 913, 918, 921, 1001, 1003, 1004, 1006, 1301 (2019)

CONFIDENTIALITY AND PRIVILEGED COMMUNICATIONS

In the military, only certain relationships are recognized as involving privileged communication and therefore have confidentiality. Because privileges run contrary to a court's truth-seeking function, they are narrowly construed. Privileges may be waived by the privilege holder. Waiver occurs when the privilege holder voluntarily discloses or consents to disclosure of any significant part of the matter or communication. Commanders must respect the privileges set forth below, absent waiver or an applicable exception to the privilege. Confidentiality and privileged communications in the Air National Guard (ANG) are largely governed by the law of the state in which the communication takes place.

Communications to Clergy

- A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made as a formal act of religion or matter of conscience
- Applies to civilians and service members. The term "clergyman" includes a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.
- Privilege extends to the chaplain's or clergyman's staff

Attorney-Client Privilege

- Privilege applies to all information divulged to an Area Defense Counsel (ADC), Special Victims' Counsel (SVC) or legal assistance attorney during representation, except with respect to some future crimes or frauds and other limited exceptions
- Communications between a commander and staff judge advocate (SJA) are privileged only when the commander is acting as an agent or official of the Department of the Air Force and the commander's interests in no way conflict with those of the Department of the Air Force
- Privilege extends to non-lawyer members of the attorney's staff (e.g., paralegals, secretaries, etc.)

Physician-Patient

- The Military Rules of Evidence (MRE) generally do not recognize a physician-patient privilege
- No privilege for civilians treated in a military facility, but Privacy Act and other federal regulations protect any illegal third party disclosure

Medical Records

- Military medical records are the property of the Department of the Air Force
- Information in the health record is personal to the individual and will be properly safeguarded pursuant to the federal Healthcare Insurance Portability and Accountability Act (HIPAA)
- Commanders or commanders' designees may access members' military medical records but only to the extent necessary to ensure mission accomplishment

Psychotherapist-Patient Privilege

- A limited privilege exists between patients and psychotherapists
 - Generally, the limited privilege protects only confidential communications which are made to a psychotherapist (or assistant) for the purpose of diagnosis or treatment of the person's mental or emotional condition in cases arising under the Uniform Code of Military Justice (UCMJ)

- Exceptions include, but are not limited to: (1) when the patient is dead; (2) the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse; (3) when the psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient; (4) when there is an allegation of such misconduct the communication contemplates future misconduct; (5) when necessary to ensure safety and security of military personnel or property; or (6) law or regulation imposes a duty to report the information
- Under AFI 44-172, *Mental Health*, communications between a patient and a psychotherapist (or assistant) made for purposes of facilitating diagnosis or treatment of the patient's mental or emotional condition are confidential and must be protected against unauthorized disclosure
 - A limited privilege also applies to active duty military members ordered to undergo a sanity board pursuant to Rules for Courts-Martial (RCM) 706 and MRE 302
 - A limited privilege also exists under the Limited Privilege Suicide Prevention (LPSP) Program pursuant to AFI 44-172, which applies to confidences made after notification of an investigation or of suspicion of commission of a criminal act, and placement into the LPSP program

Department of Defense (DoD) Safety Privilege

- The deliberations, opinions, recommendations, and conclusions of safety investigators and any evidence from witnesses and contractors given under a promise of confidentiality are privileged and not releasable outside DoD safety channels
- These investigations are conducted solely for DoD mishap prevention purposes and access is highly restricted even within DoD and the Department of the Air Force
 - **NOT** for public release, foreign disclosure, disciplinary actions, line-of-duty determinations (LODs), flying evaluation boards (FEBs), litigation, claims, or assessing pecuniary liability (for or against the government)
 - The Supreme Court upheld this privilege in *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984)

Victim Advocate-Victim Privilege

- A limited privilege exists between victim advocates and victims of a sexual or violent offense
 - Generally, the limited privilege protects only confidential communications between a victim and a victim advocate or between the victim and DoD Safe Helpline staff, for victims of sexual or violent offenses in a case arising under the UCMJ, made for the purpose of facilitating advice or supportive assistance to the victim
 - Exceptions include, but are not limited to: (1) when the patient is dead; (2) federal/state law or service regulations impose a duty to report; (3) the communication clearly contemplated the future commission of a fraud or crime; (4) when necessary to ensure safety and security of military personnel or property; or (5) disclosure is constitutionally required

Drug/Alcohol Abuse Treatment Patients

- AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, grants limited protections for Department of the Air Force members who voluntarily disclose personal drug use or possession. Those protections do not include any future drug abuse.
 - Such disclosure may not be used as the basis for UCMJ action or for the characterization of service in a discharge proceeding

- A member must disclose their drug abuse before the use is discovered or the member is placed under investigation. The member may not disclose after he is ordered to give a urine sample as part of the drug testing program in which the results are pending or have been returned as positive.
- Federal law protects confidentiality of medical records pertaining to drug and alcohol abuse

Marital Privilege

- A spouse may elect not to testify against the other spouse as long as a valid marriage exists at the time they are to provide testimony (testimonial privilege)
- A spouse may prevent testimony by the other spouse (or ex-spouse) regarding private communications made during the marriage even if the marriage has been dissolved at the time of testimony (marital communications privilege)
- Neither privilege (testimonial or marital communications) applies when one spouse is charged with a crime against the person or property of the other spouse, child or children of either spouse, if the marriage is a sham as determined by state law, or if the spouses are co-conspirators in crime

Medical Quality Assurance Privilege

- 10 U.S.C. § 1102 generally restricts access to information emanating from a medical quality assurance program activity. Release is authorized “[t]o an officer, employee, or contractor of the Department of Defense who has a need for such [information] to perform official duties.”
- Information must only be used for official purposes and safeguarded in accordance with the Privacy Act and other applicable laws and regulations

Family Support Center Program

- Family Support Center (FSC) staff should neither state nor imply that confidentiality exists
- Information collected from members and families must only be used for official purposes and must be safeguarded in accordance with the Privacy Act
- FSC Director will notify the appropriate authority when an Air Force or Space Force member constitutes a potential danger to self, others, or could have an impact on the Department of the Air Force mission

REFERENCES

- The Privacy Act of 1974, 5 U.S.C. § 552a Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants, 10 U.S.C. § 1102
- Confidentiality of Records, 42 U.S.C. § 290dd-2
- Military Rules of Evidence 302, 501-514 (2019)
- Rule for Courts-Martial 706 (2019)
- DoDI 6025.18, *Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule Compliance in DoD Health Care Programs* (13 March 2019)
- DoDI 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping* (6 June 2011), incorporating Change 1, 31 August 2018
- AFI 33-332, *Air Force Privacy and Civil Liberties Program* (10 March 2020), corrective actions applied, 12 May 2020
- AFI 36-2710, *Equal Opportunity Program* (18 June 2020), incorporating AFI36-2710_AFGM2020-01, 9 September 2020
- AFI 36-3009, *Airmen and Family Readiness Centers* (30 August 2018), incorporating AFI36-3009_AFGM2020-01, 29 May 2020
- AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018), incorporating Change 1, 21 November 2019, corrective actions applied, 19 December 2019
- AFI 44-172, *Mental Health* (13 November 2015), certified current 23 April 2020
- AFI 51-110, *Professional Responsibility Program* (11 December 2018)
- DAFI 91-204, *Safety Investigations and Reporting* (21 March 2021)
- United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984)

POST-SENTENCING MATTERS

Many court-martial sentences do not go into effect automatically. All sentences of courts-martial are subject to post-trial clemency review by the convening authority, and appellate review by applicable military authorities. In the event of a court-martial conviction and sentence, the accused has the right to submit post-trial matters to the convening authority for clemency consideration. Further appellate review of the accused's case is determined by the severity of the sentence. Finally, in the event of a court-martial conviction and sentence involving a victim, the victim is also entitled to submit post-trial matters for the convening authority's review during clemency.

Statement of Trial Results (STR) and Submissions by the Accused and Victim

- Following a court-martial the military judge shall prepare and sign a Statement of Trial Results (STR). This should take place on the day the sentence in the case is announced. The STR summarizes the findings and sentence of the case and is provided to the accused's immediate commander, the convening authority and, in cases of confinement, the confinement facility. The accused, defense counsel, and victims(s) will also receive the STR.
- Within 10 calendar days (seven calendar days for summary courts-martial) of the sentence being announced, the accused and victim(s) in a case have an opportunity to submit clemency matters to the convening authority for the convening authority's consideration as to whether to approve findings of guilt or to approve or disapprove all or part of the sentence
 - Accused and victim(s) may also request an extension of time of up to 20 days to submit clemency matters
 - Accused and victim(s) may also waive his or her right to submit clemency matters
- Trial counsel shall make reasonable efforts to inform a crime victim of the right to submit a statement and the manner in which it may be submitted
- The accused may submit any clemency matters that may reasonably tend to inform the convening authority's exercise of discretion under the clemency rules. The matters must be in writing but cannot include matters that relate to the character of a crime victim unless they were admitted as evidence at trial.
- The victim may submit any clemency matters that may reasonably tend to inform the convening authority's exercise of discretion under the clemency rules. The matters must be in writing, but cannot include matters that relate to the character of the accused unless they were admitted as evidence at trial. The crime victim is entitled to only one opportunity to submit matters to the convening authority.
 - In a case where a crime victim submits matters, the accused shall be given five days from the receipt of those matters to submit any matters in rebuttal. The issues are limited to those raised in the crime victim's submissions.

Convening Authority Action

- After the court-martial is over, depending on the nature of the offenses and the punishment, the convening authority has limited authority to take “action” on the findings or sentence
- The convening authority is required to consult with the staff judge advocate (SJA) or legal advisor before taking action on the findings and/or sentence of a court-martial. The convening authority must also review matters timely submitted by the accused and victim(s) (if applicable) and may consider other matters (to include the STR, evidence introduced at the court-martial, etc.) prior to taking action.
- After considering such matters, the convening authority may take no action on the findings and sentence. If no action is taken, the convening authority’s SJA or legal advisor shall notify the military judge that no action was taken.
- In general and special courts-martial, after the convening authority action or notification that no action was taken, the military judge will complete an “Entry of Judgment” which terminates the trial proceedings and initiates the appellate process. The “Entry of Judgment” reflects the result of the court-martial as modified by any post-trial action, rulings, or orders.

Effective Date of Court-Martial Punishments

- General and Special Courts-Martial: Generally, the sentence takes effect when the judgment is entered into the record by military judge (Entry of Judgment)
- Summary Courts-Martial: Takes effect when the convening authority takes action
- Exceptions in General and Special Courts-Martial
 - *Punitive Discharge*: Not effective unless and until approved after appellate review
 - *Confinement*: Effective immediately unless deferred (i.e., delay the effective date). Deferment ends when the military judge enters judgment into the record (Entry of Judgment) unless otherwise stated by the convening authority
 - *Reduction in Grade*: Effective 14 days after announcement of the sentence or the date on which the sentence is approved by the convening authority (summary court-martial only) unless deferred
 - *Forfeiture of Pay and Allowances*: Effective 14 days after announcement of the sentence or the date on which the sentence is approved by the convening authority (summary courts-martial only) unless deferred or waived. They cannot be deferred or waived if the member’s ETS has expired. There are a number of rules that impact the deferment and waiver of forfeitures and these rules are necessary to address both adjudged and automatic forfeitures.
 - *Automatic Forfeitures*: An accused automatically forfeits pay and allowances, up to the jurisdictional limits of their court-martial, during any period of confinement if the adjudged sentence includes death or a punitive discharge, or any sentence to confinement for more than six months. The jurisdictional limit at a general court-martial (GCM) is total forfeiture of a member’s pay and allowances and the limit at a special court-martial (SPCM) is forfeiture of two-thirds of a member’s pay per month for 12 months.
 - *Waiver of Automatic Forfeitures*: In addition, when taking action, the convening authority may lessen the impact of “automatic” forfeitures of pay by “waiving” them for up to six months. A convening authority may waive mandatory forfeitures but only in cases where the accused has dependents. The waived forfeitures are for the benefit of the accused’s dependents and are paid directly to the dependents.

- Restriction and Hard Labor Without Confinement: Effective upon Entry of Judgment and executed concurrently

REFERENCES

UCMJ arts. 57, 58a, 58b, 60, 60a, 60b, 60c

Rules for Courts-Martial 1101-1114 (2019)

AFI 51-201, *Administration of Military Justice* (18 January 2019), including all AFGMs

United States v. Eminizer, 56 MJ 441 (2002)

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TOTAL FORCE: AIR RESERVE COMPONENT (ARC)

Regular Air Force (RegAF), Air National Guard (ANG), and Air Force Reserve (AFR) Airmen and Guardians work together as a team in air, space, and cyberspace worldwide. Together, the AFR and ANG make up the Air Reserve Component (ARC). The ARC's mission is to provide combat ready forces to the Department of the Air Force whenever needed.

ARC Personnel Categories

- Ready Reserve: Includes the Selected Reserve and Individual Ready Reserve (IRR) who are available to be involuntarily ordered to active duty in time of war or national emergency, pursuant to 10 U.S.C. §§ 12301 and 12302
 - *Selected Reserve*: Those units and individuals within the Ready Reserve approved by the Joint Chiefs of Staff as essential to initial wartime missions that they have priority over all other reserves. It includes traditional reservists, individual mobilization augmentees (IMA), active guard reservists (AGR), and military technicians.
 - *Individual Ready Reserve (IRR)*: Individuals who have had training and previous experience in the Regular component or the Selected Reserve and still have a military service obligation
 - Includes all ANG (including inactive National Guard (ING))
- Active Guard Reserve (AGR): Reservists on full-time active duty (AD) for the purpose of organizing, administering, recruiting, instructing or training Reserve Component units, or performing duties prescribed in 10 U.S.C. § 12310. AGRs do not usually mobilize, as they are the steady force that stays to organize, administer, recruit, instruct, or train others.
- Standby Reserve: Pool of trained individuals (other than those in the Ready Reserve or Retired Reserve) who could be ordered to active duty only in time of war or national emergency
- Retired Reserve: Reservists who have at least 20 years of service and are either waiting to turn 60 years of age to collect retirement pay (nicknamed a "Gray Area" retiree) or are over age 60 and receiving retirement pay
- Regular Active Duty Retired: May be ordered to active duty by the Secretary of the Air Force (SecAF) if deemed necessary for the national defense

Air Force Reserve (AFR)

- AFR is an integrated Total Force partner in every Department of the Air Force core mission, providing combat-ready forces to fly, fight, and win. In addition to the categories discussed above, participating reservists hold a duty status.
- Types of Reserve Personnel Duty Status:
 - *Air Reserve Technician (ART)*: Members are full-time federal civil service employees of a Department of the Air Force reserve unit and serve in dual roles as both civilians and Reserve Airmen
 - *Traditional Reservist (CAT A)*: Assigned to stand-alone reserve units
 - Required to perform 14 days of annual training (AT) and 24 days during unit training assemblies (UTAs) in inactive duty training (IDT) status (each UTA day counts for two IDTs, for a total 48 IDTs required)
 - *Individual Mobilization Augmentees (IMAs) (CAT B)*: Attached to and augment active component and government agency missions and are rated by active component or government agency supervisors

- Required to perform 12 days of IDT per year (two IDT periods per day for a total of 24 IDTs) and 12-14 days of AT, in a Title 10, active duty status per year
- IMAs may volunteer for additional active duty orders or be mobilized to fill Department of the Air Force mission requirements
- *Participating Individual Ready Reservist (PIRR)*: Participate for points only that are applied toward retirement

Air National Guard (ANG)

- ANG members have a dual-role based on the Militia Clause of U.S. Constitution, Article 1, Section 8
 - Federal Role (Title 10): Mission is to maintain well-trained, well-equipped units available for prompt mobilization under Title 10 of the United States Code during war and national emergencies
 - State Role (Title 32): Mission is to provide trained, organized and disciplined units and individuals to protect life, property, and preserve peace, order and public safety within the state or territory by providing emergency relief support, search and rescue, support to civil defense authorities and counterdrug operations
 - There are also National Guard Title 32 technicians and Title 5 employees who are federal civilian employees. The Title 32 technicians must be members of the state ANG and in addition to their federal civil service (dual status technicians). Military membership is not required for Title 5 employees.
- ANG Required Training: 24 days of IDTs (two IDTs per day for a total of 48 IDTs) and 15 days of active duty service per year

Administrative and Disciplinary Action

- Air Force Reservists:
 - Reservists are subject to the Uniform Code of Military Justice (UCMJ) in active duty and inactive duty training status
 - Address questions of alleged misconduct or administrative actions to include separation and/or demotion involving IMAs to their respective active duty staff judge advocate (SJA) and the Headquarters Readiness and Integration Organization (HQ RIO) legal advisor located at Headquarters Air Reserve Personnel Center (ARPC)'s legal office (ARPC/JA). ARPC/JA advises the Individual Reservist's (IR) HQ RIO Detachment Commander and the RIO/CC. The active duty commander and HQ RIO Detachment Commander share administrative control (ADCON) over the IR.
 - Address questions about alleged misconduct involving Traditional Reservists and ARTs to their reserve unit's SJA who coordinates with their respective Numbered Air Force legal office (NAF/JA) and HQ AFRC/JA
 - If deployed, look to member's activation orders for guidance
- ANG Members:
 - Misconduct of ANG members is governed by the member's status at the time of the action. ANG personnel are only subject to the UCMJ when "in federal service" (Article 2(a)(3), UCMJ), although they may be subject to their particular state military justice code at other times.

- Activation orders show if member is in Title 10 or Title 32 status and where assigned for administrative control/operational control
- If in Title 10 status, contact local SJA, who will coordinate with the 201st Mission Support Squadron's legal office (201 MSS/JA)
- If in Title 32 status, contact local SJA, who will coordinate with the member's home unit SJA (unless orders direct otherwise)
- If in military technician status, contact local SJA, who will coordinate through member's home unit (if in military status) or the applicable State Human Resources Office (if in civilian status)

REFERENCES

U.S. Const. Art. 1, § 8 UCMJ art. 2(a)(3)

Reserve Officer Personnel Management Act, 10 U.S.C. §§ 10141-10154

Reserve Forces Revitalization Act of 1996, 10 U.S.C. §§ 10215-10218

Reserve Forces Act of 1955, 10 U.S.C. §§ 12301 *et seq.*

DoDI 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components* (11 March 2014), incorporating Change 1, 19 May 2015

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

AIR NATIONAL GUARD DUTY STATUS

Members of the Air National Guard (ANG) may serve in various federal missions during their career, but upon completion of any active duty tour, they go back to their state. There are three basic types of status.

State Active Duty (SAD)

- Application: When activated by the state for a purely state function
- Benefits: Member's pay and benefits are provided by the state and there is no federal military pay or retirement benefits. SAD members are not covered under the Servicemembers Civil Relief Act (SCRA) and may not gain entitlement to certain benefits administered by the U.S. Department of Veterans Affairs (VA benefits). Members may be covered under any state equivalent of SCRA and may be entitled to special state health benefits. The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to SAD if: (1) the duty is for 14 days or more, and (2) the duty is in support of a national emergency or disaster declared by the President. Additionally, the member's state may have an equivalent to USERRA under state law.
- Liability: The state is responsible for addressing any personal claims of loss by members while in SAD status. The state may be liable to the federal government for loss or damage to equipment caused by the member including a requirement to reimburse the federal government.
- Discipline:
 - *Criminal*: SAD members are not subject to the Uniform Code of Military Justice (UCMJ). However, members must adhere to state military justice codes (sometimes called "militia codes") and may be court-martialed under state law. They are subject to prosecution under civilian jurisdiction which can include federal prosecution if the act occurred on exclusive federal land. A member can potentially be subject to prosecution under state law or the state military code and also federal law because the sources of authority are considered separate "sovereigns." Thus, double jeopardy protections may not apply.
 - *Adverse Administrative Actions*: Some Department of the Air Force instructions may not apply to SAD status members. Consult with the staff judge advocate (SJA) regarding applicability of Department of the Air Force instructions and state alternatives.

Title 10

- Applicability:
 - With the consent of the member and governor — voluntary non-training temporary duty assignments (TDYs) under 10 U.S.C. § 12301(d)
 - With the consent of the member and governor — voluntary extended active duty in the regular Department of the Air Force, but with a defined end date under 10 U.S.C. § 10211 and 10 U.S.C. § 10305
 - "Call-up" or mobilizations — involuntary (relatively rare) for specific contingencies or emergencies under 10 U.S.C. § 12301(a), § 12302, and § 12304
- Benefits: All federal benefits and pay (but may be limited based on tour length)
- Liability: The federal government is responsible for addressing any personal claims of loss by members while in Title 10 status. The federal government may be liable to claimants for loss incurred by the actions of the Title 10 member.

- Discipline:

- *Criminal:* Title 10 status members must adhere to the UCMJ and may be court-martialed under federal law. They are subject to prosecution under civilian jurisdiction, including federal prosecution if the act occurred on exclusive federal land. However, because the UCMJ and civilian federal courts get their authority from the same “sovereign” (the federal government), double jeopardy protections will prevent prosecution in both forums. See Chapter 1, Sources of Command Authority, for additional guidance and requirements concerning disciplinary actions.
- *Adverse Administrative Actions:* All adverse administrative action Department of the Air Force instructions apply to Title 10 status members. Some actions like demotions may not be effectuated upon the member’s return to the state. This may result in the member reverting to the higher grade. Consult with your SJA and coordinate with the member’s state commanders to determine appropriate action. See Chapter 1, Sources of Command Authority, for additional guidance and requirements concerning administrative actions.

Title 32 (“Traditional,” Full-time Duty, and Active Guard Reserves (AGRs))

- Applicability:

- Drill Status Guardsman (DSGs) (i.e. “Traditional Guardsmen”) perform duty via Inactive Duty Training (IDT) in monthly “drills” (Unit Training Assemblies (UTAs)) and in Annual Training (AT)
- State Air Guard Reserves (AGRs) are on full-time status with a specific charter to organize, administer, recruit, instruct, or train National Guard members under Title 32
- Technicians are “federal technicians” employed by the National Guard under 32 U.S.C. § 709 to meet the day-to-day needs of maintaining the force. They are federal employees in a sense, but the law authorizes state Adjutant Generals (and their subordinate chain of command) to supervise them. Their benefits and disciplinary actions are determined by their employment agreement and are often quite different from other military members. Consult your SJA and civilian personnel office (CPO) before initiating any administrative and/or disciplinary action, change in their employment, or change in their working conditions.

- Benefits: Similar federal benefits and pay to regular Department of the Air Force members for an equivalent period of service, including the potential to earn a federal retirement pension. Duty under Title 32 is not covered under the SCRA and may not gain entitlement to certain VA benefits. Members may be covered under the state equivalent of SCRA and may be entitled to special state health benefits. Consult with the member’s SJA for details.

- Liability: Even though the command and control of Title 32 members flow through the state, their duty is ultimately federal. Thus, the federal government is responsible for addressing any personal claims of loss by members while in Title 32 status. This often manifests in Line of Duty (LOD) determinations for injuries suffered while in training.

- Discipline:

- *Criminal:* Title 32 members are not subject to the UCMJ. They must adhere to state military justice codes (sometimes called “militia codes”) and may be court-martialed under state law. They are subject to prosecution under civilian jurisdiction, including federal prosecution if the act occurred on exclusive federal land. A member CAN be subject to prosecution under state law/military code AND federal law because the sources of authority are considered separate “sovereigns.” Thus, double jeopardy protections may not apply.

-- *Adverse Administrative Actions*: reference AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, AFI 36-2907, *Adverse Administrative Actions*, and other applicable AFIs as they apply to Title 32 status members unless otherwise directed by state law

Table 6.1: Air National Guard Duty Status Quick Reference Guide

Common situations and the rules that apply based on duty status

Situations	State Active Duty (SAD)	Title 32	Title 10
Command and Control	Governor	Governor	President
Location of Duty	Determined by State Law	Territory of the U.S.	Worldwide
Funding	State	Federal	Federal
Mission Types	Determined by State Law	Training and other federally authorized missions	Overseas Training and Federal missions
Duties may include law enforcement on civilians	Yes	Yes	No
Military Discipline	State Military Code	State Military Code	Uniform Code of Military Justice (UCMJ)
Adverse Administrative Action	IAW applicable AFIs	IAW applicable AFIs	IAW applicable AFIs but demotions may not be permanent
Indemnity from Accidents	State	Federal	Federal

REFERENCES

- Policies and Regulations: Participation of Reserve Officers in Preparation and Administration, 10 U.S.C. § 10211
- Air Force Reserve Forces Policy Committee, 10 U.S.C. § 10305
- Reserve Components, 10 U.S.C. §§ 12301-12304
- Technicians: Employment, Use, Status, 32 U.S.C. § 709
- Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4335
- AFI 36-2907, *Adverse Administrative Actions* (22 May 2020), incorporating Change 1, 15 January 2021
- AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

ACTIVE GUARD AND RESERVE (AGR) CURTAILMENTS

The Air Force Reserve (AFR) Active Guard and Reserve (AGR) Program is established by Department of Defense policy and implemented in AFI 36-2110 *Total Force Assignments*. The AGR career program provides an AGR with career opportunities for promotion, career progression, retention, education, and professional development. This program may lead to an active duty retirement after attaining the required years of federal service.

- Initial entry into the AGR program is by individual application for selection assignment. As of 15 September 2020, initial assignment length is three years. However, some assignments may be shorter.
- An AGR is accepted into the career program when (1) accepted by an AGR review board or (2) when the AGR reaches sanctuary or (3) exceeds the 6-year probationary period (cumulative) as an AGR
- A voluntary release from an AGR tour is referred to as a curtailment
 - AGRs may request a curtailment of an AGR tour based on position realignment, personal hardship, retirement or other valid reasons
 - AGRs submit a curtailment request through the chain of command to arrive at the Air Reserve Personnel Center's (ARPC) Assignments Division (ARPC/DPAA) (O-5 and below) or the Air Force Reserve Senior Leader Management Office (AF/REG) (O-6) at least 120 days prior to and no more than 365 days before the requested date of separation (DOS)
 - Curtailment requests for the purpose of retirement must be received by ARPC/DPAA (O-5 and below) or AF/REG (O-6) no later than 60 days prior to the requested permissive temporary duty assignment (TDY)/terminal leave start date but not less than 120 days before the retirement date
- Involuntary Curtailment: Commanders considering involuntary curtailment should use all quality force management tools available prior to initiating an involuntary curtailment
 - Depending on the nature of the involuntary curtailment, commanders should consider discharge in lieu of involuntary curtailment
 - Commanders should consult with ARPC/DPAA (O-5 and below) or AF/REG (O-6) and their servicing legal office to determine if an involuntary curtailment is appropriate
 - Air National Guard Instruction (ANGI) 36-101, *Air National Guard Active Guard Reserve (AGR) Program*, provides guidance on curtailment actions involving Title 32 AGR members. Additionally, most states have their own state supplement which can change the career service timeline of an AGR member. As such, commanders should also consult their state's staff judge advocate (SJA) regarding state specific requirements.

REFERENCES

DoDI 1205.18, *Full-Time Support (FTS) to the Reserve Components* (5 June 2020)

AFI 36-2110, *Total Force Assignments* (5 October 2018), including AFI36-2110_AFGM2021-01, 26 January 2021

AFI 36-2131, *Administration of Sanctuary in the Air Force Reserve Components* (27 July 2011)

ANGI 36-101, *Air National Guard Active Guard Reserve (AGR) Program* (3 June 2010), certified current 14 August 2014

REASSIGNMENT TO THE INDIVIDUAL READY RESERVE (IRR)

The Individual Ready Reserve (IRR) is a manpower pool consisting of individuals who have had some training and who have served previously in the active component or in the Selected Reserve. Members may voluntarily participate in training for retirement points and promotion, in accordance with AFI 36-2110, *Total Force Assignments*. Transfers to the IRR may be voluntary or involuntary.

Voluntary Reassignment to the IRR

- Members who no longer desire to actively participate in the Air Force Reserve (AFR) may request to be reassigned to the IRR
- Commanders **MUST** deny “voluntary” requests for reassignment to the IRR when discharge is more appropriate
- Application: Members request reassignment to the IRR by submitting AF IMT 1288, *Application for Ready Reserve Assignment*, or a personal letter to the wing commander or equivalent (unit reserve program) or to the Readiness Integration Organization (RIO) detachment commander for the Individual Mobilization Augmentee (IMA) program
 - As part of completing AF Form 1288, members must certify that they either have or have not received an Unfavorable Information File (UIF) within the last two years (enlisted) or five years (officers). If the member has had a UIF during this period, the last five Officer Performance Reports (OPRs) or Enlisted Performance Reports (EPRs) must accompany the assignment request.
- Approval Authority:
 - Wing commander or equivalent (unit program) or the RIO detachment commander (IMA program) is the approval authority for voluntary requests
 - In the unit reserve program, any commander in the chain of command may disapprove a request for reassignment
 - In the IMA program, the RIO detachment commander may disapprove a request for reassignment
 - Approved IRR reassignment requests must have an effective date not earlier than six months from the date the request is submitted. The wing commander or equivalent (unit program) or Air Reserve Personnel Center’s (ARPC) Accessions/Assignment Division (ARPC/DPAR) (IMA program) may waive the six month requirement.

Involuntary Reassignment to the IRR

- Involuntary reassignment to the IRR from the Ready Reserve for cause is generally inappropriate
 - Use involuntary reassignment only as a last resort
 - Initiate involuntary reassignment for cause or derogatory reasons only after all appropriate disciplinary and/or administrative actions have been taken and documented
 - Consider exceptions to these policies on a case-by-case basis
- Involuntary reassignment is not a substitute for discharge. If administrative discharge is warranted, process in accordance with AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*.

- Appropriate Situations: Some potential situations where involuntary reassignment may be appropriate include (but are not limited to):
 - *Unexcused Absences*: In the unit reserve program, if a member has nine or more unexcused absences from Unit Training Assemblies (UTAs) in a 12-month period, commanders should reassign the member to the IRR if not discharging the member
 - *Failure to Meet Fitness Standards*: Members of the IRR maintaining an unsatisfactory fitness level after a second 90-day period are referred to the commander of the unit of assignment or attachment for appropriate action per AFMAN 36-2905, *Air Force Physical Fitness Program*
 - *Health Assessment Non-compliance*: Failure to comply with requirement for reserve component periodic health assessment
 - *Whereabouts Unknown*: Member not immediately available but not missing in action
- Evaluation: Unit commander (or RIO detachment commander) will examine and evaluate any information received that indicates a member should be considered for involuntary reassignment
- Memorandum of Notification: If a commander determines grounds exist to warrant initiation of involuntary reassignment action, a memorandum of notification (MON) is sent to the member. A sample MON is provided in AFI 36-2110 at Attachment 21, and includes a list of information which must be provided to the member.
 - *Personally Deliver*: When feasible, the MON should be personally delivered to the member
 - Delivering official must obtain a written acknowledgement of receipt, and a sample is provided at AFI 36-2110, Attachment 22
 - If member refuses to acknowledge receipt, the delivery official makes an annotation to that effect on the receipt, including the date and time of delivery of the notification. The receipt should be kept in the case file.
 - *Certified Mail*: When personal delivery is not feasible, the unit should send the MON by certified mail, return receipt requested, to the member's last known address
 - If attempts to deliver the MON by certified mail are unsuccessful, send the MON by first class mail using the format at AFI 36-2110, Attachment 23
 - If the member resides outside the United States, an equivalent form of notice may be used
 - *Undelivered*: If postal service returns the MON without indicating a more current address, file the returned envelope in the case file and request verification of last permanent mailing address from the postmaster using the format at AFI 36-2110, Attachment 24
 - If an address correction is received, send the MON to the member at that address
 - If all attempts to deliver the MON by certified and first class mail are unsuccessful, complete the Affidavit of Service by Mail using the format in AFI 36-2110, Attachment 25
- Review:
 - *Member*: Member must be allowed 15 calendar days after receipt of the MON to consult with legal counsel and submit statements or documents on his/her behalf. If the member fails to submit statements or documents during this time period, the case may proceed based on the information available, without further notice to the member.
 - *Commander*: The commander reviews any matters submitted by the member and determines whether to continue involuntary reassignment action

- Determination:

- If the commander elects to continue the involuntary reassignment action, the case file must be processed through the servicing staff judge advocate (SJA) and chain of command to the approval authority
 - The approval authority reviews the case to determine whether the facts are properly substantiated. The approval authority then approves or denies the reassignment and notifies the member.
- It is in the best interest of both the Department of the Air Force and the member to process the case as expeditiously as possible. Commanders should monitor the process to ensure cases are processed without undue delay.

REFERENCES

AFI 36-2110, *Total Force Assignments* (5 October 2018), including AFI36-2110_AFGM2021-01, 26 January 2021

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

AFMAN 36-2136, *Reserve Personnel Participation* (6 September 2019)

AFMAN 36-2905, *Air Force Physical Fitness Program* (11 December 2020)

AF IMT 1288, *Application for Ready Reserve Assignment* (23 May 2019)

INSTALLATION BARMENT

Installation commanders have broad authority to control activities on their installations, including the authority to remove or exclude any person whose presence on the installation is unauthorized or disrupts good order and discipline. This authority enables a commander to fulfill his or her responsibilities to protect personnel and property, to maintain good order and discipline, and to ensure the successful, uninterrupted performance of the Department of Defense's (DoD) mission. The terms debarment, barment, and barred are often used interchangeably to mean that an individual is no longer permitted access to a specific DoD installation.

Commander's Responsibilities and Options

- An installation commander's decision to remove or exclude a person from the installation is subject to judicial review
 - However, the decision is given substantial deference and will not be overturned unless proven to be arbitrary or capricious
 - An illegal barment could subject a commander to personal civil liability in a lawsuit
- An installation commander **MAY NOT** delegate the authority to bar an individual from an installation to a subordinate

Who is Subject to Barment

- Members of the armed forces are not normally barred. Service members being involuntarily separated may, in conjunction with their discharge, be barred for good cause.
- Non-affiliated civilians may be barred from a military installation
- Dependent family members and retirees may be barred from an installation, but they must be granted reasonable access to the installation to receive any medical or dental care they are entitled (statutory right under 10 U.S.C. §§ 1074 and 1076)
 - Medical and dental care is subject to the availability of space, facilities, and the capabilities of the medical and dental staff
 - Care may not be permitted to interfere with the primary mission of those facilities
- Civilian employees may be barred, but they should be removed from federal service before being barred
 - Otherwise, the employee may still be entitled to collect a salary
 - Check with the Civilian Personnel Office (CPO) to determine if the local collective bargaining agreement, should one exist, contains additional due process requirements
- Salespersons and businesses may be barred for misconduct. Misconduct may lead to barment of a single agent or an entire firm.
- Contractors may be barred for misconduct. Contractor employees with security clearances are not entitled to greater protection from barment.
- Possession, distribution, or use of drugs is commonly used as a good cause for barment, while exceeding weight standards as a discharge basis would likely not be good cause

Procedural Requirements

- A person who is barred from an installation should be notified, in writing, that he or she is prohibited from entering the installation. The notification (called a “barment letter”) should state the reason for and period of the barment. It should also include an exception for access to medical or dental care, if the person subject to barment is entitled to such care.
- The barment is for the specific installation and does not prohibit access to other military installations not subject to the control of the issuing installation commander
- Determining the barment period is a matter of discretion
 - Commanders should consider the individual, the reason for the proposed barment, and the need for good order, discipline, and security. The bottom line is what is reasonable given all the circumstances.
 - Length of the barment period should be stated in the barment letter. The commander may bar an individual for a specific length of time or, in appropriate cases, the barment may be for an indefinite period of time.
- Individuals can ask the installation commander to lift the barment at any time, regardless of whether the barment is for a set period or indefinite
- A copy of the barment letter should be hand-delivered to the individual or sent by certified mail to ensure a record of receipt
- An individual who enters an installation after receiving notice of barment from the installation commander is subject to federal criminal prosecution under *Entering Military Naval or Coast Guard Property*, 18 U.S.C. § 1382. Maximum penalty for violation of the law is six months confinement and a \$500 fine.

REFERENCES

- Medical and Dental Care for Members, Certain Former Members, and Dependents, 10 U.S.C. §§ 1074, 1076
- Entering Military Naval or Coast Guard Property, 18 U.S.C. § 1382
- Penalty for Violation of Security Regulations and Orders, 50 U.S.C. § 797
- Installation Entry Policy, Civil Disturbance Intervention and Disaster Assistance, 32 C.F.R. § 809a.1-a.5 (2015)
- DoDI 5200.08, *Security of DoD Installations and Resources and the DoD Physical Security Review Board (PSRB)* (10 December 2005), incorporating through Change 3, 20 November 2015
- DTM 09-012, *Interim Policy Guidance for DoD Physical Access Control* (8 December 2009), incorporating through Change 9, 23 August 2018
- DoDM 5200.08V3_AFMAN 31-101 V3, *Installation Perimeter Access Control*, 27 February 2020

DRIVING PRIVILEGES

Driving on a military installation, whether in a government motor vehicle (GMV) or a privately owned vehicle (POV) is a privilege granted by the installation commander or their designee. This authority may be delegated to the vice installation commander (CV), mission support group commander (MSG/CC), or other appropriate official not occupying a law enforcement, investigative, or other position raising the appearance of a conflict of interest.

Operating a POV on the Installation

- A person must do the following in order to drive on a Department of the Air Force installation:
 - Lawfully be licensed to operate motor vehicles in appropriate classifications and not under suspension or revocation in any state or host country
 - Comply with all laws and regulations governing motor vehicle operations on installation
 - Comply with installation vehicle registration requirements
 - Possess, while operating a motor vehicle, and produce on request the following:
 - Proof of ownership or state registration, if required by state or host nation
 - A valid state driver's license (or host nation/status of forces agreement (SOFA) license)
 - A valid vehicle safety inspection sticker, if required by state or host nation
 - Documents that establish identification and status of cargo and vehicle occupants, when appropriate
 - Proof of valid insurance
 - Operators of GOVs must have proof of authorization to operate the vehicle

Implied Consent

- When operating a motor vehicle on a military installation, a driver gives implied consent in a number of areas:
 - Consent to test for the presence of alcohol or drugs in their blood, on their breath, and in their urine, provided there is a lawful stop, apprehension, or citation for any impaired driving offense committed while driving or in physical control of a motor vehicle on a military installation
 - Consent to the removal and temporary impoundment of their POVs if it is illegally parked, interfering with military operations, creating a safety hazard, disabled by accident or incident, abandoned, or left unattended in a restricted or controlled access area

Suspension

- An installation commander can administratively suspend or revoke installation driving privileges
 - A suspension of up to six months may be appropriate if a driver continually violates installation parking standards or habitually receives other non-moving vehicle violations
 - The installation commander is authorized to suspend installation driving privileges pending resolution of an intoxicated driving incident under any of the following circumstances:
 - Refusal to take or complete a lawfully requested chemical test for the presence of alcohol or other drugs in the driver's system

- Operating a motor vehicle on or off the installation with blood alcohol content (BAC) or breath alcohol content (BRAC) of 0.08 percent by volume or higher, or in excess of the applicable BAC or BRAC level in the local civilian jurisdiction, whichever is applicable
- Receipt of an arrest report or other official document reasonably showing an intoxicated driving incident occurred within a reasonable time period

Revocation

- An installation commander will immediately revoke driving privileges for a period of not less than one year in any of the following circumstances:
 - Person is lawfully apprehended for intoxicated driving and refuses to submit to or complete tests to measure blood alcohol or drug content
 - Conviction, nonjudicial punishment, or a military or civilian administrative action resulting in the suspension or revocation of a driver's license for intoxicated driving
 - The installation commander determines an immediate revocation is required to preserve public safety or the good order and discipline of military personnel

Procedures

- A point system is used on-base to provide a uniform administrative device to supervise traffic offenses impartially. Points are assessed for violations of motor vehicle traffic regulations for on-base and off-base traffic offenses. Certain procedural guidelines apply before an individual's driving privilege may be suspended or revoked.
 - An individual has the right to a hearing before a designated hearing officer. The individual must be notified of his or her right to a hearing, but it is only held if the individual requests it within the prescribed time period.
 - A suspension for a driving while intoxicated offense may be effective immediately if based on reliable evidence. Such evidence can include witness statements, a military or civilian police report, chemical test results, refusal to complete chemical testing, video tapes, written statements, field sobriety test results, or other evidence.
- Civilian offenders may be prosecuted in federal magistrate court for on-base traffic offenses. However, jurisdiction is dependent upon the installation where the offense occurred.
- If an Air National Guard (ANG) base is co-located with a Regular Air Force (RegAF) component installation, the authority to grant and deny driving privileges and the creation of driving rules rests with the RegAF installation commander (or designee). If an ANG base is not co-located with a RegAF installation, the ANG installation commander holds the authority and responsibility of granting and denying driving privileges and creating and enforcing driving rules.

REFERENCE

AFI 31-218, *Motor Vehicle Traffic Supervision* (22 May 2006), including AFI31-218_AFGM2016-01, 4 October 2016, certified current 14 July 2017

ARMY AND AIR FORCE EXCHANGE SERVICE (AAFES) AND COMMISSARY BENEFITS

Although Department of Defense (DoD) directives and service regulations govern exchange and commissary benefits, commanders may exercise some discretion in granting, suspending, or revoking privileges.

Exchange

- Army and Air Force Exchange Service (AAFES): The establishment of an exchange is authorized by the Department of the Army and Department of the Air Force at any federal or state installation and other locations where DoD military personnel are assigned
- An exchange may be established at other locations, such as state-operated National Guard installations or Reserve Training Centers, provided it is cost-effective

Exchange Privileges

- Unlimited exchange privileges extend to all uniformed, retired, and other personnel (such as Medal of Honor recipients) and their dependents
- Unlimited exchange privileges extend for two years to involuntarily separated service members under other than adverse conditions
- Unlimited exchange privileges may be extended to government departments or agencies outside the DoD when:
 - Local commander determines the desired supplies or services cannot be conveniently obtained elsewhere, and
 - Supplies or services can be furnished without unduly impairing the service to exchange patrons
- Limited exchange privileges extend to some government civilian employees and to others, such as members of foreign military services visiting a military installation
- In non-foreign areas outside the Continental United States (OCONUS) (e.g., Alaska, Hawaii, and Puerto Rico), the responsible commander may extend limited or unlimited privileges to other personnel or organizations if it is in the best interest of the mission of the command concerned
- Exceptions involving patron privileges are based on alleviating personal hardships and may only be granted by the Secretary of the Army or Secretary of the Air Force (SecAF) upon request by the appropriate installation commander through command channels
- All Honorably-discharged veterans may utilize the AAFES online catalog service to purchase goods

Abuse of Exchange Privileges

- Exchange patrons are prohibited from abusing privileges, including:
 - Purchasing items for the purposes of resale, transfer, or exchange to unauthorized persons
 - Using exchange merchandise or services in the conduct of any activity for the production of income
 - Theft, intentional or repeated presentation of dishonored checks, and other indebtedness

Commander Actions when Abuse of Exchange Privileges Occurs

- When an abuse of privileges occurs, the commander will take prompt disciplinary and other appropriate action, such as revocation or suspension of exchange privileges
 - Commanders may revoke exchange privileges for any period deemed appropriate, except the minimum period of revocation is six months for shoplifting, employee pilferage, and intentional presentation of dishonored checks
 - The individual concerned will be provided notice of the charges and the opportunity to offer rebutting evidence
 - On appeal, the commander who revoked the privileges, or the next higher commander, may reinstate exchange privileges for cogent and compelling reasons

Commissary Privileges

- The DoD operates commissaries as an integral element of the military pay and benefits system and as an institutional element to foster the sense of community among military personnel and their families. The intent of patronage is to provide an income benefit through cost-savings on food and household items necessary to subsist and maintain the household of the military family.
- Authorized Patrons:
 - Several classes of individuals are authorized commissary privileges by regulation, including active duty and their dependent family members, retired personnel and their dependent family members, reservists, and others
 - At overseas locations, military commanders or Secretaries of military departments may extend commissary privileges to certain individuals and groups of individuals, provided it is without detriment to the ability to fulfill the military mission
- Restrictions on Purchases:
 - Authorized personnel may not sell or give away commissary purchases to individuals or groups not entitled to commissary privileges
 - Personnel are prohibited from using commissary purchases to support a private business. However, patrons may use their commissary privileges to support limited charitable endeavors (e.g., preparing a meal for their place of worship or a homeless shelter).
 - Sanctions for violating restrictions on purchases range from temporary suspension or permanent revocation of commissary privileges to appropriate action under regulation, UCMJ, or federal or state law

Appointing Agents for Authorized Users

- An installation commander is authorized to extend exchange and commissary privileges to the agent of an authorized user. Appointment typically occurs when the authorized user is unable to exercise their privileges on their own behalf.

REFERENCES

DoDI 1330.17, *DoD Commissary Program* (18 June 2014), incorporating through Change 2, 14 September 2018

AFI 34-211(I), *Army and Air Force Exchange Service Operations* (11 July 2017)

SUBSTANCE ABUSE

Department of the Air Force Drug Use Policy

- Military personnel are expected to refrain from drug abuse and maintain standards of behavior, performance, and discipline consistent with the Uniform Code of Military Justice (UCMJ), public law, and Department of the Air Force policy
- Illegal use of drugs by Air Force and Space Force members is a serious breach of discipline that is incompatible with Department of the Air Force standards. This misconduct places the member's continued service in jeopardy and could lead to action resulting in a punitive discharge or an administrative discharge under other than honorable conditions (UOTHC).

Department of the Air Force Alcohol Abuse Policy

- The Department of the Air Force recognizes that alcohol misuse negatively affects public behavior, duty performance, and physical and mental health
- The Department of the Air Force provides comprehensive clinical assistance to eligible beneficiaries seeking help for alcohol abuse problems

Unit Commanders and Supervisor Responsibilities

- Observe and document the performance and conduct of subordinates and direct immediate supervisors to do the same
- Evaluate potential or identified abusers through the evaluation process of AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*. The provisions of this chapter also applies to Air National Guard (ANG) members when eligible for Department of Defense (DoD) medical services.
- Provide appropriate incentives to encourage members to seek help for problems with drugs or alcohol without fear of negative consequences
- Commanders are responsible for and have control of all personnel, administrative, and disciplinary actions pertaining to members involved in ADAPT
- Command involvement is critical to a comprehensive treatment program, as well as during aftercare and follow-up services. The commander shall also provide command authority to implement the treatment plan when the member does not voluntarily comply.

Referral Types (Military Members)

- Self-Identification (Drug Abuse): Military members who voluntarily disclose prior drug use or possession are granted limited protections. Such disclosure may not be used against the member in UCMJ actions or in characterizing an administrative discharge as long as he or she:
 - Is seeking treatment and voluntarily discloses evidence of personal drug use or possession to the unit commander, first sergeant, ADAPT staff member, or a military medical or mental health professional; and
 - Has not previously been apprehended for drug involvement, placed under investigation for drug abuse, ordered to give a urine sample as part of the drug-testing program in which the results are still pending or have been returned as positive, advised of a recommendation for administrative separation for drug abuse, or has entered treatment for drug abuse

- The limited protection available for self-identification does not apply to disciplinary or other action based on independently derived evidence (other than the results of a commander-directed drug test), including evidence of continued drug abuse after the member initially entered a treatment program
- Self-Identification (Alcohol Abuse): Department of the Air Force members with alcohol abuse problems are encouraged to seek assistance from their commander, first sergeant, ADAPT staff member, a military medical professional, or mental health professional
 - Self-identification is reserved for members who are not currently under investigation or pending action as a result of alcohol related misconduct
 - Self-identified members who enter the ADAPT assessment process will be held to the same standards as others entering substance abuse and misuse education, counseling and treatment programs. However, if the member is not diagnosed with a substance use disorder, the member's chain of command will not be notified.
- Commander Referral: A unit commander **will** refer all service members for assessment when substance use or misuse is suspected to be a contributing factor in any misconduct (e.g., driving under the influence (DUI), driving while intoxicated (DWI), public intoxication, drunk and disorderly conduct, spousal or child abuse and maltreatment, underage drinking, positive drug test, etc.) or when notified by medical personnel pursuant to AFI 44-121
 - Commanders should also refer a member for assessment when drugs or alcohol are thought to be a contributing factor in any incident, such as deteriorating duty performance, excessive tardiness, absenteeism, misconduct, or unacceptable social behavior
 - Commanders who fail to comply with this requirement place members at increased risk for developing severe substance problems and jeopardize the mission
- Incident to Medical Care: Medical personnel must notify a member's unit commander and the ADAPT program manager when a member is observed, identified, or suspected to be under the influence of drugs or alcohol, receives treatment for any injury or illness that may be the result of substance abuse or is suspected of abusing substances
- Random Drug Testing: Positive drug test results mandate a substance abuse evaluation
- Probable Cause Searches: Commanders who receive information of a positive drug test conducted pursuant to a probable cause search must refer the member for a substance abuse assessment
- Inspections: Commanders may order inspections (to include urinalysis) of his or her unit, in whole or in part, pursuant to Military Rule of Evidence (MRE) 313 so long as the primary purpose is to ensure the security, military fitness, or good order and discipline of the unit
 - Positive drug test results mandate a substance abuse evaluation

Substance Abuse Assessment

- The ADAPT program attempts to identify and provide assistance to military members with drug problems, but the focus of the ADAPT program is prevention and clinical treatment
 - ADAPT staff members evaluate all members suspected of drug or alcohol abuse in order to help the commander understand the extent of the substance abuse problem and to determine the patient's need for treatment and the level of care required
 - Except in cases of self-identification, personal information provided by the member in response to assessment questions **MAY** be used against the member in a court-martial or considered for characterizing service in an administrative discharge

- Before the assessment, the patient is advised of the ADAPT program's nature, the limits on confidentiality, the Privacy Act, and the Health Insurance Portability and Accountability Act (HIPAA), the responsibilities of the ADAPT staff, the purpose, access and disposition of mental health records, and the potential consequences of refusing assessment, preventive counseling and/or treatment
- Upon completion of the assessment, the information gathered will form the basis for patient diagnosis, treatment planning, and delivery of substance abuse services. Assessment results for individuals who are charged with DUI or DWI will be provided to the patient's commander.
- Information is presented to the Treatment Team (TT) so that the TT may develop and guide the clinical course of treatment. The TT decides the proper course of action and treatment plan for the client after examining all the facts presented.
- A TT is comprised of:
 - Commander and/or first sergeant. These individuals must be involved at program entry, termination, and any time there are significant treatment difficulties with the patient
 - Patient's immediate supervisor
 - ADAPT program manager
 - Certified substance abuse counselor
 - Mental health provider currently involved in patient care
 - The patient, unless deemed clinically inappropriate

Management of Drug and Alcohol Abusers

- Tools available to the unit commander to manage drug abusers include:
 - Nonjudicial punishment under Article 15, UCMJ
 - Court-martial
 - Line of Duty (LOD) determinations
 - Action involving security clearance, access to classified information, or access to restricted areas
 - Suspension from Personnel Reliability Program
 - Duty assignment review to determine if member should continue in current duties
 - Unfavorable Information File (UIF) or control roster action based on drug related misconduct or substandard duty performance
 - Administrative separation for documented failure to meet standards (members who fail the ADAPT program due to refusal to cooperate may be separated)
 - Administrative demotion, withholding of promotion, and denial of reenlistment

Administrative Discharge for Drug Abuse

- Drug abuse is incompatible with military service and all Airmen and Guardians who abused drugs, even once, are subject to discharge for misconduct
 - Drug abuse is defined in AFI 36-3208, *Administrative Separation of Airmen*, as the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug. This includes:

- Improper use of prescription medication, including using a prescribed medication in an incorrect manner (e.g., crushing and snorting a pill prescribed to be taken orally)
- Any controlled substance in schedules I, II, III, IV, and V of The Controlled Substances Act, 21 U.S.C. § 812
- Any intoxicating substance, other than alcohol, introduced into the body in any manner for purposes of altering mood or function
- Use and ingestion of hemp products and its derivatives, to include, but not limited to, Cannabidiol (CBD) oil
- Evidence obtained through urinalysis or from the member in connection with initial entry in rehabilitation and treatment may be used to establish a basis for discharge. AFI 36-3208 provides a discharge basis for active duty members who abuse drugs and AFI 36-3209, *Separation and Retirement Procedures for Air National Guard (ANG) and Air Force Reserve (AFR) Members*, provides a discharge basis for Air Reserve Component (ARC) members who abuse drugs.
- Generally, a member found to have abused drugs will be discharged unless the member meets **ALL SEVEN** of the following criteria:
 - Drug abuse is a departure from the member's usual and customary behavior;
 - Drug abuse occurred as the result of drug experimentation;
 - Drug abuse does not involve recurring incidents, other than drug experimentation;
 - Member does not desire to engage in or intend to engage in drug abuse in the future;
 - Drug abuse under all the circumstances is not likely to recur;
 - Member's continued presence in the Air Force or Space Force is consistent with the interest of the Department of the Air Force in maintaining good order and discipline; **and**
 - Drug abuse did not involve drug distribution
- It is the member's burden to prove retention is warranted under these limited criteria

Civilian Employees (Drug Abuse)

- The Air Force Drug Demand Reduction Program, which includes the Air Force Civilian Drug Testing Program, is designed to achieve a drug-free workplace, consistent with Executive Order 12564, *Drug-Free Federal Workplace*
- Similar to military members, civilian employees who self-identify for illicit drug use are provided a "safe haven" from disciplinary action if they:
 - Voluntarily identify themselves as a user of illicit drugs prior to being notified of the requirement to provide a specimen for testing or being identified through other means (e.g., drug testing, investigation);
 - Obtain and cooperate with appropriate counseling or rehabilitation;
 - Agree to and sign a last chance or statement of agreement; **and**
 - Thereafter refrain from illicit drug use
- Commanders and supervisors must be alert to behaviors that could indicate a substance abuse problem and advise employees they may voluntarily seek assessment and treatment referral services

- Commanders should consult with the Civilian Personnel Section (CPO) and/or the legal office if they suspect a civilian employee's poor performance, discipline, or conduct may be caused by drug abuse
- Commanders who identify or have evidence of drug abuse by members of the Active Guard Reserve (AGR), dual-status technicians (in their military status), and drill-status guard (DSG) members should notify the active duty servicing staff judge advocate (SJA), state ANG SJA, and CPO, as appropriate, for a determination of appropriate action under applicable technician regulations and any applicable provisions of the local collective bargaining agreement

Civilian Employees (Alcohol Abuse)

- Under the Rehabilitation Act of 1973, alcohol abuse may be considered a disability that entitles an employee to special considerations. Be sure to consult with the SJA and the CPO if such issues arise.

Legal Aspects of Alcohol Related Issues

- Drunk Driving: Operation of a motor vehicle while under the influence of alcohol or driving while intoxicated, on or off the installation, is a serious offense and is incompatible with Department of the Air Force standards
 - Military members who commit this offense may be subject to punitive action under the UCMJ. Many installations have agreements with local civilian jurisdictions about how these cases are handled. Consult with your SJA when such issues arise regarding DUI/DWIs.
 - Civilian employees apprehended for DUI on exclusive or concurrent federal jurisdiction installations are subject to prosecution in U.S. Magistrate Court
 - A DUI conviction, in either state or federal court, will subject the individual to revocation of on-base driving privileges. Refusing to consent to blood, breath, or other standardized field sobriety tests (SFST) can also have negative impacts for on-base driving privileges, even absent a conviction.
- Minimum Drinking Age: The minimum age for purchasing, possessing, or consuming alcoholic beverages on Department of the Air Force installations will be consistent with the law of the state, territory, possession, or foreign country in which the installation is located. Adults may only furnish alcohol to minors in accordance with applicable state law.
 - When an entire unit marks a unique or non-routine military occasion on a military installation, the minimum drinking age for military attendees at a particular unit gathering may be lowered. However, the minimum drinking age must be 18 or above.
 - Military personnel 18 years old or older may purchase, serve, sell, possess, and consume alcoholic beverages outside the United States, its territories, and possession unless a higher drinking-age requirement exists in accordance with local laws (e.g., the drinking age in Canada is 19, the drinking age in Japan is 20)
- Private organizations may not sell or serve alcoholic beverages on an Air Force or Space Force installation, subject to narrow exceptions found in AFI 34-219, *Alcoholic Beverage Program*, for private organization personnel assisting at Morale Welfare & Recreation functions for a fee

REFERENCES

UCMJ art. 15

Privacy Act, 5 U.S.C. § 552a

Controlled Substance Act, 21 U.S.C. § 812

Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*

Health Insurance Portability and Accountability Act (HIPAA), Pub.L. 104–191 (1996)

Executive Order 12564, *Drug-Free Federal Workplace* (15 September 1989)

Military Rule of Evidence 313 (2019)

DoDM5210.42_AFMAN13-501, *Nuclear Weapons Personnel Reliability Program (PRP)* (19 September 2018), including DoDM5210.42_AFMAN13-501_AFGM2020-01, 14 April 2020

AFI 34-219, *Alcoholic Beverage Program* (30 April 2019), including AFI34-219_AFGM2021-01, 3 February 2021

AFI 36-2907, *Adverse Administrative Action* (22 May 2020), incorporating Change 1, 15 January 2021

AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay* (8 October 2015)

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), incorporating through Change 7, 2 July 2013, including AFI 36-3206_AFGM2020-01 (18 June 2020)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2020-01 (1 July 2020)

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard (ANG) and Air Force Reserve (AFR) Members* (14 April 2005), incorporating through Change 3, 20 September 2011

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018), incorporating Change 1, 21 November 2019, corrective actions applied 19 December 2019

AFMAN 44-197, *Military Drug Demand Reduction Program*, (30 July 2019), including AFMAN44-197_AFGM2020-01, 7 July 2020

PRIVATE ORGANIZATIONS

Definitions

- A private organization (PO) is a self-sustaining special interest group, set up by individuals acting exclusively outside the scope of any official position they may have in the Department of the Air Force or federal government, to include civilians, contractors, Air Force Reserve (AFR) and Air National Guard (ANG) members
- POs are **NOT** any of the following:
 - Federal entities and should not be treated as such
 - Nonappropriated fund instrumentalities (NAFIs), nor are they entitled to the sovereign immunities and privileges given to NAFIs, the Air Force, or the Space Force
 - “For us, by us” (FUBU) fundraising entities
 - FUBU organizations are composed primarily of Department of Defense (DoD) employees and their dependents when fundraising among their own members for the benefit of welfare funds for their own members or dependents. This includes most Morale, Welfare and Recreation (MWR) programs, regardless of funding sources, as well as unit unofficial activities.
 - Unofficial unit-affiliated activities (e.g. coffee funds, water funds, sunshine funds), unless current assets exceed a monthly average of \$1,000 over a 3-month period, in which case the activity must apply to the installation for PO recognition
 - Unofficial unit activities’ fundraising efforts are considered FUBU fundraising efforts within the meaning of Joint Ethics Regulation (JER) Section 3-210
 - Unofficial unit activities may temporarily exceed the asset limit (\$1,000) for a time period not to exceed six months if the substantial majority (more than 75%) of assets will be expended on an upcoming large unit event such as a holiday party, military ball, etc.
 - The \$1,000 average monthly limit may be increased by \$100 for every 50 unit members over 300 members, to a maximum of \$5,000 monthly average
 - Organizations considered POs by Air Force Instructions (AFIs) (these are governed by DoD directives and instructions): scouting organizations operating on Air Force or Space Force military installations, military relief societies, banks or credit unions, support provided under Innovative Readiness Training, American National Red Cross, United Seaman’s Service, and United Service Organizations

Establishing a Private Organization

- A PO must submit a written constitution, bylaws, or other documents through the Force Support Resource Management/Resource Flight Chief, Force Support Squadron Commander (FSS/CC), and the staff judge advocate (SJA) for consideration by the installation commander
- POs must be approved in writing by the installation commander or designee when he or she determines a PO will make a positive contribution to the quality of life of base personnel
 - Authorization may be withdrawn if the PO prejudices or discredits the United States government, conflicts with government activities, or for any other reason or just cause
- A PO must resubmit certification every two years or when there is a change in the purpose, function, or membership eligibility of the PO, whichever comes first, and must be reviewed by the installation SJA

- Dining social clubs (DSC) are ANG-specific types of POs that can operate on ANG installations in compliance with federal, state, and local laws. DSCs exist to enhance morale and esprit de corps, to provide activities and facilities for fellowship and recreation for ANG members and their families, and to provide services similar to those available to active and reserve forces through the Air Force Club Program (although they are not part of the Air Force Club Program). For additional guidelines and requirements about operating DSCs on ANG installations, consult ANGI 34-121, *Dining Social Club Organizations*.

Operating Rules

- Installation commanders provide limited supervision of POs. They authorize and withdraw PO authorization to operate on the installation and ensure compliance with requirements. They do not control or dictate internal activities or structure of the PO.
- Installation commanders at ANG installations must annually ensure compliance with regulatory guidance for all unofficial activities or POs on their installation utilizing the Commander's Checklist located in Attachment 2 of AFI 34-223 ANG SUP, *Private Organizations (PO) Program*
- POs must prevent the appearance of an official sanction or support by the DoD
 - POs may not use the seals, logos, or insignia of the DoD, any DoD component, Air Force or Space Force unit, or Department of the Air Force or DoD installation on organizational letterhead, correspondence, titles, or with organization programs, locations, or activities
 - POs operating on an Air Force or Space Force installation may use the name or abbreviation of the DoD, Air Force or Space Force unit, or installation in the PO name if the status of the PO is apparent and unambiguous and there is no appearance of official sanction or support by the DoD, provided that:
 - POs receive written approval from the installation commander before using the name or abbreviation;
 - The name or abbreviation does not mislead members of the public to assume a PO is an organizational unit of the Department of the Air Force; and
 - POs promptly display the following disclaimer on all print and electronic media mentioning the PO: "THIS IS A PRIVATE ORGANIZATION. IT IS NOT A PART OF THE DEPARTMENT OF DEFENSE OR ANY OF ITS COMPONENTS AND IT HAS NO GOVERNMENT STATUS"
- Service members may not perform activities for a PO while in an official duty status
- POs must be self-sustaining, primarily through dues, contributions, service charges, fees, or special assessments of their members
- POs must use budgets and financial statements
- FSS/CCs or directors monitor and advise all POs and direct the resource management flight chief to keep a file on each PO
- ANG FSS/CCs on ANG installations direct the base services manager to keep a file on each PO
- ANG units collocated on active duty Air Force or Space Force installations may establish an agreement with the host that the active duty host FSS monitors ANG POs
- Resource management flight chiefs review each PO annually to make sure financial statements, documents, records, and procedures are in order

- POs with certain levels of gross annual revenue must undergo audits and financial reviews at the PO's own expenses
 - POs with gross revenues of \$250,000 or more must have an annual audit done by a certified public accountant (CPA) or Certified Government Financial Manager in an overseas location when the Resource Management Flight Chief documents a CPA is not available
 - POs with gross revenues of at least \$100,000 but less than \$250,000 must have an annual financial review conducted by an accountant (CPA not required)
 - POs with gross revenues of more than \$5,000 but less than \$100,000 are not required to conduct independent audits or financial reviews, but must prepare an annual financial statement for review by the Force Support Resource Manager/Resource Management Flight Chief no later than 20 days following the end of the PO's fiscal year
- POs will not engage in activities that duplicate or compete with activities of Army and Air Force Exchange Service (AAFES) or the Services NAFIs
- POs are prohibited from conducting games of chance, lotteries, or other gambling activities, except in very limited circumstances such as certain types of raffles (for further guidance on raffles see AFI 34-223, *Private Organizations Program*, paragraph 10.20 and the JER)
- The installation commander or designee approves PO continuous thrift shop sales operations and occasional on-installation events for fundraising purposes
 - Occasional fundraising is defined as not more than three (3) events per calendar quarter
 - The length of a fundraising event is fact dependent. For example, a community theater performance might only last a single evening; while a bake sale might last three days over a holiday weekend.
- POs will not sell or serve alcoholic beverages on Air Force or Space Force installations with very limited exceptions (see AFI 34-223, *Private Organizations Program*, paragraph 10.14 for further guidance)
- POs must have liability insurance unless waived by the installation commander or the Mission Support Group Commander (MSG/CC) (if delegated the authority)
 - Insurance should be required unless the PO's activities are negligible in risk
 - PO members are jointly and severally personally liable for the obligations of the PO
 - A waiver of insurance will not protect the PO or its members from valid claims or successful lawsuits
- POs desiring tax-exempt status must file an application with the IRS and state taxing authority
- POs may not directly solicit cash donations for their organization on base
- Installation legal offices should not provide legal advice to prospective and currently recognized POs
 - However, legal advisors may assist POs by identifying guidance or compliance information such as formation, certification and recertification, annual financial reports and fiscal controls, dissolution, and other provisions

- POs may not unlawfully discriminate in hiring practices or membership policies on the basis of age (over 40 years old), race, religion, color, national origin, disability, ethnic group, or gender (including pregnancy, gender identity, and sexual orientation)
- Religiously oriented POs may be authorized on installations if:
 - Requests by similar organizations are also approved
 - Authorization is for non-exclusive use of government facilities
 - No sign or insignia or other organizational identification is placed on or inside government facilities except when the organization's activities are in progress
 - Membership is not restricted to members of the religion involved
 - Installation staff chaplain coordinates on the request

Logistical Support to Private Organizations

- The use of government equipment and systems for other than official purposes is extremely limited
- Government communication systems (e.g. weekly upcoming events e-mail from the Public Affairs Office) may be used to inform Airmen and Guardians of PO events of possible interest to the unit and its families
 - However, official communication systems should not be used to advertise PO fundraiser and membership events, unless the primary purpose of the communication is for something other than the PO's effort such as to inform Airmen or Guardians of a local event of possible interest
- POs must furnish their own equipment, supplies, and other materials with limited exceptions
- Logistical support to POs may be permitted if the installation commander determines the request meets the following test under JER 3-211:
 - Does not interfere with performance of official duties or detract from readiness
 - Community relations or other public affairs purposes are served by the support
 - It is appropriate to associate DoD with the event
 - Event is of interest and benefits the local community or DoD
 - Base is able and willing to provide comparable support to requests to hold similar events from similarly-situated POs
 - Support is not restricted by other statutes
 - There is no admission fee beyond reasonable costs
- POs in overseas areas may be able to request additional logistical support. Always consult the SJA for such requests

REFERENCES

DoD 5500.07-R, *Joint Ethics Regulation (JER)*, (30 August 1993), incorporating through Change 7, 17 November 2011

AFI 34-219, *Alcoholic Beverage Program* (30 April 2019), including AFI34-219_AFGM2021-01, 3 February 2021

AFI 34-223, *Private Organizations Program* (13 December 2018)

AFI 36-3101, *Fundraising* (9 October 2018)

AFI 34-223_ANGSUP, *Private Organizations (PO) Program* (13 November 2014)

ANGI 34-121, *Dining Social Club Organizations* (1 September 2005), certified current 4 September 2019

POLITICAL ACTIVITIES, FREE SPEECH, DEMONSTRATIONS, OPEN HOUSES, EXTREMIST ACTIVITY, AND HATE GROUPS

Commander Responsibilities

- Commanders have the inherent authority and responsibility to execute the mission, protect resources, and maintain good order and discipline. This authority and responsibility includes placing lawful restrictions upon participation by Department of the Air Force members in certain dissident and protest activities, including demonstrations.
- Commanders balance this inherent command responsibility with individual Department of the Air Force members' constitutional right of free expression. Commanders preserve Air Force and Space Force members' right of free expression consistent to the maximum extent possible, consistent with good order, discipline, and national security.
- To properly balance these interests, commanders must exercise prudent judgment and consult with their staff judge advocate (SJA). In appropriate cases, commanders may find it advisable to confer with higher authority before initiating action to restrict manifestations of dissent.

Writing for Publications

- Air Force and Space Force members may not distribute or post any unofficial printed or written material within any Air Force or Space Force installation without permission of the installation commander
- Air Force and Space Force members may not write for unofficial publications during duty hours

Extremist Activity and Hate Groups

- Military personnel must reject participation in organizations that advocate or espouse supremacist, extremist, or criminal gang doctrine, ideology or causes, including those that (1) advance, encourage, or advocate illegal causes, (2) attempt to create illegal discrimination based on race, color, gender (including sexual orientation), religion, national origin or ethnic group, (3) advocate the use of force or violence, or, (4) otherwise engage in an effort to deprive individuals of their civil rights
 - Members who actively participate in such groups or activities are subject to adverse administrative and disciplinary action, including separation and punishment under the Uniform Code of Military Justice (UCMJ)
 - Active participation includes publicly demonstrating, rallying, recruiting and training members, organizing or leading such organizations, knowingly wearing gang colors or clothing, having tattoos or body markings associated with such gang organizations, or otherwise engaging in activities in relation to such organizations or in furtherance of the objectives of such organization that the commander concerned finds to be detrimental to good order, discipline, or mission accomplishment, is incompatible with military service and prohibited
 - Mere membership in these groups is not prohibited. However, membership must be considered in evaluating or assigning members, particularly supervisory positions.

Controlling or Prohibiting Demonstrations and Protests

- Commanders may also take measures to control or prevent demonstrations and protest activities within the installation
 - Demonstrations or related activities on an Air Force or Space Force installation may be prohibited if:
 - They interfere with mission accomplishment, or
 - They present a clear danger to loyalty, discipline, or morale of service members
 - No one may enter a military installation for any purpose prohibited by law or regulation, or reenter an installation after having been barred by order of the installation commander
 - Air Force and Space Force members are prohibited from participating in demonstrations when they are on duty, when they are in a foreign country, when they are in uniform, when their activities constitute a breach of law and order, or when violence is likely to result. Members who violate this prohibition are subject to disciplinary action under Article 92, UCMJ.

Political Activities by Members of the Department of the Air Force

- Air Force and Space Force members may register to vote and express a personal opinion on political candidates and issues, but not as a representative of the Armed Forces
- For a list of permitted and prohibited political activities, see AFI 51-508, *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel*, paragraphs 2.3 and 2.4
- The Hatch Act, 5 U.S.C. §§ 7321-7326, governs political activities of Department of Defense (DoD) civilian employees. Among other restrictions, the Hatch Act prohibits most employees from engaging in political activities in a federal workplace, while on duty, while wearing a government uniform, badge, or insignia, and while using a government vehicle.

Open House Requirements and Responsibilities

- An open house where the general public is invited onto the installation does not, in and of itself, cause the installation to lose its status as “closed” for the purposes of limiting political or ideological speech. “Closed” means not a public forum for protests or demonstrations, or other ideological expression.
 - Open houses are for local community relations. Commanders retain the authority to prevent political or ideological speech or demonstrations on the installation during an open house.
 - Commanders can prevent or stop political or ideological speech because such speech creates a danger to loyalty, good order, and discipline
 - Commanders need not wait until loyalty, good order, or discipline are actually negatively affected before preventing or stopping the speech
 - Speech that presents such a danger can be prevented at the outset because it presents such a danger
 - If a person or group attempts to engage in political or ideological expression or demonstrations on an installation, the commander should escort the offending party or parties off the installation and issue a barment letter, the violation of which can subject the offender to criminal penalties.

- An installation loses its status as “closed” for the purposes of preventing political or ideological speech or demonstrations **ONLY IF** the commander allows political or ideological speech or demonstrations to occur or by abandoning control over the installation or parts of it
- Installation commanders should be careful about whom they invite onto the installation and what they allow those people to do. It is important to work closely with the SJA to plan open houses so that potential problems can be prevented and to solve free speech issues should they arise.

REFERENCES

DoDD 1344.10, *Political Activities by Members of the Armed Forces* (19 February 2008)

AFI 51-508, *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel* (12 October 2018)

The Hatch Act, 5 U.S.C. §§ 7321-7326

RELIGIOUS ISSUES IN THE DEPARTMENT OF THE AIR FORCE

Issues involving religion have an inherent potential to generate media, advocacy group, and political attention quickly. Resolution of religious issues, such as accommodation requests, religious speech or practices in a duty context, and potential religious endorsement, is always highly dependent on the facts and circumstances and seldom amenable to simple, bright line, “one-size-fits-all” rules. It is essential that commanders consult their staff chaplains and staff judge advocates (SJAs) when religious issues arise.

Constitutional Basis

- First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”
 - *Establishment Clause*: Essentially requires (in appearance and reality) the government not exercise a preference for one religion over another, or religion over non-religion
 - *Free Exercise Clause*: Constitutional protection for religious speech and practices (but does **NOT** absolutely protect all religious expression under all circumstances)
 - Consult your SJA for analytical standards/tests for governmental restrictions on religious expression based upon most current statutes, regulations and case law

Religious Expression Authorities

- Religious expression in the Department of the Air Force is governed primarily by the Free Exercise Clause, the Religious Freedom Restoration Act (RFRA), DoDI 1300.17, *Religious Liberty in the Military Services*, provisions of AFI 1-1, *Air Force Standards*, and AFD 52-2, *Accommodation of Religious Practices in the Air Force*
- RFRA provides broad protection for religious liberty and ensures the government shall not substantially burden a person’s exercise of religion unless the burden is:
 - In furtherance of a compelling governmental interest, and
 - Is the least restrictive means of furthering that compelling governmental interest

General Principles for Leaders

- Leaders at all levels must balance constitutional protections for free exercise of religion with the constitutional prohibition against governmental establishment of religion
- Commanders must ensure their words and actions cannot reasonably be construed to be officially endorsing or disapproving of, or extending preferential treatment for any faith, belief, or absence of belief
 - Commanders must be sensitive to the potential for real-world military implications when religion and official business intersect. Context is critical and commanders should exercise caution before engaging in activities in the military setting that would leave a reasonable observer with the impression that the commander is endorsing, sponsoring, or inhibiting religion.
 - Not all members of the command will share the commander’s beliefs and may feel alienated or marginalized when their commander espouses a particular religious belief or preference for one religion
 - Some may question whether they will be viewed with impartiality or with disfavor if they do not agree with their new commander’s religious views

Religious Expression in the Workplace

- Airmen and Guardians may permissibly engage in voluntary discussions of religion, even if conducted in uniform, to the same extent that they may engage in comparable private expression about subjects not related to religious issues, where it is clear that the discussions are personal, not official, and they are free from coercion or appearance of coercion
- An Airman or Guardian may share his or her faith or invite another co-worker to attend his or her place of worship as long the Airman or Guardian respects the views and requests of the co-worker
- Restrictions on such expression must be based on generally applicable content-neutral factors, such as whether the expression would disrupt mission accomplishment or would have an adverse impact on good order and discipline. Additionally, restrictions on religious-related expression are appropriate if the member's expression can reasonably be attributed to the Air Force or Space Force, thus constituting an impermissible endorsement.
- When religious expression is directed towards other Airmen or Guardians, the speaker must refrain from such expression when an Airman or Guardian asks that it stop or otherwise demonstrates that it is unwelcome
- Leaders should be mindful that subordinates could perceive their religious expression as coercive, even if it is not intended as such. Consequently, supervisors must not use their authority to require or discourage religious expression among subordinates.

Prayer

- As a general rule, prayer constitutes protected religious expression. However, in official circumstances, or when superior/subordinate relationships are involved, superiors must be sensitive to the potential that personal religious expressions may appear official or coercive.
- Public prayer must not endorse, or appear to endorse, religion
 - It may not be part of routine official business, e.g., staff meetings
 - If a chaplain is asked to pray at an official event, the choice of prayer is in the discretion of the chaplain as long as the prayer does not state or imply any Air Force or Space Force endorsement of a specific religion
- Mutual respect and common sense should serve as a guide, including consideration of unusual circumstances, such as a recent death, imminent danger, etc.
- Leaders should avoid leading prayers at official functions. Any prayers should be led by a chaplain, if possible, or another Airman or Guardian.
- Religious content/prayer is acceptable as an exercise of free exercise in ceremonies that are primarily personal to the honoree, such as retirements. If a commander is the presiding official for the event, the commander could ask to have the "emcee" announce that the religious content/prayer is at the request of the honoree.
 - All such requests should be coordinated with the commander well in advance of the ceremony. The commander retains responsibility for ensuring that the proposed religious content does not violate Air Force or Space Force instructions or regulations.
- Attendance at National Prayer Breakfast activities in uniform is neither prohibited nor encouraged (i.e., it is left to attendee's discretion)

Religious Displays

- Displays of religious articles are permissible in government offices where it is clear that the articles are personal and are not used to promote a specific religious belief to office members
- Supervisors may restrict all posters regardless of content, or posters of a certain size, in private work areas, or require that such posters be displayed facing the employee, and not on common walls. However, a supervisor is not permitted to specifically single out religious posters (e.g., the Ten Commandments) for either negative or preferential treatment compared to other posters.
- Context is critical. While the Ten Commandments may be permissible in the employee's cubicle, religious displays have the potential to send a message of endorsement of particular religious beliefs.
- Commanders and others in leadership positions must be sensitive to the nature, extent, and circumstances of their religious displays

Official Communications

- Chaplains at all levels of command are encouraged to work with Public Affairs (PA) to generate communication plans for the dissemination of information for chapel-sponsored religious services, activities, or events
- As part of this communication plan, PA will recommend appropriate internal and external communications channels
 - Traditional forms of PA communication tools, which include advertisement in base newspapers, base social media pages, base webpages, and wing stand-up, may be used to disseminate information on religious services, activities, and events
 - Distribution of information about chapel-sponsored services, activities or events, should be consistent with the tools commanders use to inform Airmen and Guardians and their families about other command programs or events (e.g., Morale, Welfare and Recreation (MWR), Airman and Family Readiness Center (A&FRC), Sexual Assault Prevention and Response (SAPR), etc.)
- Commanders at all levels who are considering personally disseminating information about chapel-sponsored religious services, activities, or events, should balance constitutional protections for their own free exercise of religion — including individual expressions of religious beliefs — with the constitutional prohibition against governmental establishment of religion. Commanders should ensure their words and actions cannot reasonably be construed to be officially endorsing, disapproving of, or extending preferential treatment for any faith, belief, or absence of belief.
 - For example, a commander may disseminate the installation chapel's schedule of events for the month and encourage attendance at events/activities that are open to all Airmen and Guardians (and their dependents), of all faith groups and belief systems
 - However, a commander may not endorse or encourage attendance at an activity or event that is limited to members of a single faith, especially if the commander is also a member of that faith
- In official government correspondence, including e-mail messages, the Air Force or Space Force determines what is appropriate for inclusion
- Supervisors may restrict the inclusion of extraneous information (including religious or other messages) that have no relationship to Air Force or Space Force business, so long as the restriction prohibits religious (or anti-religious) extraneous messages in the same manner as it restricts all other types of extraneous language

Accommodation of Religious Practices

- The Air Force or the Space Force places a high value on the rights of Department of Air Force members to observe the tenets of their respective religions or to observe no religion at all
- Pursuant to DoDI 1300.17, the Department of the Air Force will approve an individual's request for accommodation of a religious practice unless the request would have an adverse impact on readiness, unit cohesion, good order and discipline, health, or safety
- Commanders and supervisors must fairly consider requests for religious accommodation. Airmen and Guardians requesting accommodation will continue to comply with directives, instructions, and lawful orders from which they are requesting accommodation unless and until the request is approved.
- Requests for religious accommodations must be assessed on a case-by-case basis, considering the unique facts, and in consultation with the servicing SJA and chaplain

Religious Apparel

- Airmen and Guardians are permitted to wear religious apparel in uniform unless, as determined pursuant to service regulation, the apparel would interfere with performance of duty or is not neat and conservative
 - "Religious apparel" is defined as apparel worn as part of the doctrinal or traditional observances of a religious faith practiced by an Airman or Guardian
- Airmen and Guardians may request a waiver to wear neat and conservative religious apparel. Such requests will be approved when accommodation does not affect mission accomplishment. Requests for waiver from a policy that substantially affects an Airman or Guardian's exercise of religion may only be denied when the military policy, practice, or duty furthers a compelling governmental interest and is the least restrictive means of furthering that interest.
- Religious Apparel During Worship Services by Chaplains: Does not require a religious accommodation request and may be worn in uniform while Airmen and Guardians are present at a worship service, rite, or other ritual distinct to a faith or denominational group
- Religious Apparel (Not Visible or Otherwise Apparent): Does not require a religious accommodation request and may be worn in uniform, provided it does not interfere with the performance of the member's military duties or the proper wearing of any authorized article of the uniform
 - Commanders may, for operational or safety reasons, limit the wear of religious apparel that is not visible or otherwise apparent
- Religious Apparel (Visible or Apparent): For religious apparel that is visible or apparent, Airmen and Guardians may request a waiver of AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, to permit wear of neat and conservative religious apparel
- Wing commanders, or Department of the Air Force (DAF), major command (MAJCOM), numbered air force (NAF), field operating agency (FOA), and direct reporting unit (DRU) Directors (O-6/GS-15 and above) are approval authorities for requests to wear hijabs, beards, turbans or underturbans/patka with unshorn beards and unshorn hair, and indoor/outdoor head coverings. The Deputy Chief of Staff for Manpower, Personnel, and Services (DAF/A1) is the approval authority for other apparel accommodation requests.
- DAF/A1, the Chief of Air Force Reserve (AF/RE), and the Director of the Air National Guard (NGB/CF), as appropriate, make final determination on recommendations to disapprove requests to wear hijabs, beards, turbans or underturbans/patkas, unshorn beards, unshorn hair, and indoor/outdoor head coverings

- Considerations: Commanders should ask the following questions when considering requests for uniform and dress and appearance-related religious accommodation:
 - Will it impair the safe and effective operations of weapons, military equipment, or machinery?
 - Will it pose a health or safety hazard?
 - Will it interfere with the wear or proper function of special or protective clothing or equipment?
 - Will it otherwise impair discipline, morale, unit cohesion, or accomplishment of the unit mission?

Immunizations

- MAJCOM commanders are approval authorities for religious exemption requests pertaining to immunizations and medical practices. The decision on whether to grant or deny the exemption is made with consultation from medical providers, judge advocates, and chaplains.
- Permanent exemptions for religious reasons are not granted in the Department of the Air Force. AF/SG is the final appeal authority for denial of requests for accommodations for religious practices pertaining to medical practices

Outside Advocacy Groups

- Interest group advocates (including lawyers) seeking a particular resolution of a religious issue of which they have become aware might call commanders directly, advising that the law “requires” the commander to adopt a specific position. If this happens, commanders should consider the following guidelines:
 - Commanders should avoid sounding sympathetic or agreeable to the group’s pronouncements
 - Threats of adverse publicity or litigation are to be expected. Commanders should inform PA and their SJA of the identity of the caller and the nature of the call (including the requests and demand of the caller) and advise the caller that such consultation will occur.
 - Commanders should not take unilateral action (i.e., action without first consulting SJA and/or PA) to do what the caller is requesting or demanding
 - Commanders may thank the caller for bringing the matter to their attention, but should not make any promises to investigate or take action within a specific time frame
 - Commanders who believe a follow-up response is required should make that known to their SJA, PA, and chaplains, but should disengage themselves from further communication with the advocacy group

REFERENCES

U.S. Const. Amend. 1

Religious Apparel: Wearing While in Uniform, 10 U.S.C. § 774

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq.*

DoDI 1300.17, *Religious Liberty in the Military Services* (1 September 2020)

AFI 1-1, *Air Force Standards* (7 August 2012) incorporating Change 1, 12 November 2014

AFI 35-101, *Public Affairs Operations*, (20 November 2020)

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel* (7 February 2020),
incorporating Change 2, 15 March 2021

AFI 48-110, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases*,
(7 October 2013), certified current 16 February 2018

AFPD 52-2, *Accommodation of Religious Practices in the Air Force* (28 July 2020)

SOCIAL MEDIA AND ELECTRONIC COMMUNICATION

Social media includes, but is not limited to, weblogs, message boards, video sharing, streaming, and other media sharing sites. The rules for use of social media can be divided into two categories: official use (use by the Department of the Air Force to conduct official Air Force and Space Force duties) and personal use. In its official capacity, it is a tool that allows the Department of the Air Force to conduct outreach with the general public, as well as for Airmen and Guardians — military and civilian — to interact personally with friends, family, the media, elected officials, and strangers. The rules for social media use within the Department of Defense (DoD) are frequently updated. Consult your staff judge advocate (SJA) for the latest standard. Social media tools have become a staple of modern life and most Airmen and Guardians have one or more personal social media accounts.

Official Use

- Official use of social media must comply with all DoD and Department of the Air Force guidance as outlined in AFI 35-101, *Public Affairs Operations*, Section 5D
- Any official use of social media must be approved by a Department of the Air Force Public Affairs Office (PA) and follow policies established by the Secretary of the Air Force Office of Public Affairs (SAF/PA)
- Official Department of the Air Force social media presences must be registered on <https://www.af.mil/AFSites.aspx> by completing the online form located at <https://www.af.mil/AFSites/SiteRegistration.aspx>. Closed social media sites will not be accepted in the registry.
 - Federal-compatible Terms of Service (TOS) agreements may modify or remove problematic clauses in standard TOS agreements and allow federal employees to legally use these tools. Before deciding to use a social media tool (e.g., Facebook, Instagram, Twitter, etc.), organizations should seek the advice of an Air Force or Space Force social media team for an updated list of federal-compatible services.
 - Air Force and Space Force official social media sites may not contain any non-public information or link to any site that contains non-public information
 - All Air Force and Space Force official social media sites should have the organization's patch or logo, a link back to the organization's .mil website, and a .mil email address on their pages to verify that they are a valid U.S. Air Force or U.S. Space Force page
 - Official Air Force and Space Force social media will not link to offensive or unrelated commercial material
 - No surveys may be conducted via official social media without prior approval
 - All Air Force and Space Force official social media sites must contain disclaimers, comment policies, and privacy policies. Contact your local PA office for sample disclaimers and comment policies.
 - Comments received on Air Force and Space Force official social media sites must be moderated for topic and language, as outlined in the comment policies
 - All Air Force and Space Force official social media posts and comments received must be maintained in accordance with Air Force and Space Force records retention guidelines

Personal Use

- Generally, the Air Force and Space Force views personal websites and blogs positively, and it respects the right of Airmen and Guardians to use them as a medium of self-expression, even if their status as Airmen and Guardians is apparent
- Social media, and electronic communication generally, encourages informal, sometimes intimate, and at times adversarial interactions. Military members and civilian employees must remember that, generally, actions prohibited in person are not otherwise condoned or tolerated through social media or electronic communication.
- Use of Government Position: Under the Standards of Ethical Conduct for Employees of the Executive Branch, government employees may not use their government position, title, or any authority associated with their public office in a manner that a member of the public could reasonably believe implies that the Air Force, Space Force, or DoD sanctions or endorses the employee's personal activities or views. Whether or not an employee's social media presence creates the impermissible appearance of Air Force, Space Force, or DoD sanction or endorsement will be evaluated considering the totality of the circumstances.
 - To avoid the appearance of government sanction or endorsement, employees should not:
 - Use their official title or official photos on personal accounts unless it is one of several non-Air Force biographical details (e.g., also include civilian employment and educational background) and the Air Force or Space Force affiliation is not given more prominence (e.g., different font or image size) than other biographical details
 - State that they are acting on behalf of the Air Force, Space Force, or DoD
 - Refer to their position, military experience, or connection to the Air Force, Space Force, or DoD as support for the employee's statements
 - Prominently display Air Force, Space Force, or DoD images, seals, or pictures in uniform (e.g., profile photo)
 - Refer to Air Force or Space Force employment, title, or position in areas other than those designated for biographical information
 - To assist in avoiding the appearance of government sanction or endorsement, employees may include a prominent disclaimer that the views expressed are the personal views of the employee and do not represent the official views of the Air Force, Space Force, or DoD
 - Airmen and Guardian (military members and civilian employees) cannot use their service affiliation for fundraising purposes on personal social media accounts except for Office of Personnel Management approved fundraisers such as the Combined Federal Campaign and the Air Force Association
- Use of Government Computers: Airmen and Guardians may use government devices to access social media sites under the limited personal use exception when it does not interfere with their official duties. However, that use must be approved by their supervisor and cannot otherwise interfere with their official duties (see AFI 17-130, *Cybersecurity Program Management*).

Professionalism and Free Speech

- Professionalism: Existing standards of professionalism apply to social media and electronic communication. This includes the guidance from AFI 36-2909, *Air Force Professional Relationships and Conduct*, which applies to military members on and off duty, DoDI 1304.33, *Protecting Against Inappropriate Relations During Recruiting and Entry Level Training*, which applies to military and civilian recruiters and trainers on and off duty, and AFI 36-703, *Civilian Conduct and Responsibility*, which applies to civilians.
- Mutual Respect: Existing standards of mutual respect apply to social media and electronic communication. The United States Government, the DoD, and the Department of the Air Force will neither condone nor tolerate unlawful discrimination of any kind. The guidance found in AFI 36-2710, *Equal Opportunity Program*, applies to electronic communication and social media interactions, on and off duty for military members. It also applies for civilians while on duty, and off duty only when the interaction constitutes misconduct and impedes the efficiency of the service.
- Private Intimate Images: Creating, distributing or broadcasting private intimate images without consent can have serious consequences. Creating, distributing, and broadcasting images of a person's private areas without his or her consent may constitute a violation of the Uniform Code of Military Justice (UCMJ) for military members, and may also violate state and other federal laws.
- Accountability: All Airmen and Guardians must use their best judgment, remembering that everyone is always accountable for what they say
- Unique Characteristics: Social media and electronic communications have several unique characteristics
 - Under some circumstances, social media interactions or electronic communications may be akin to having a conversation in a public place
 - Anonymity, or the appearance of anonymity, is sometimes present in electronic communications and social media. A military member or civilian employee is responsible for interaction with others online based on what they know, and on what they reasonably should know, about the identity of the persons with whom they interact.
- Freedom of Speech: While military members enjoy the right to free speech protected by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. Some speech is generally not protected by the First Amendment (e.g., obscenity, dangerous speech, true threats, defamation, fighting words, and child pornography).
 - Given the different character of the military community and mission, speech that interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops may be restricted under some circumstances. The Department of the Air Force has a compelling interest in preventing the advent and spread of hate groups within the service, in guarding against illegal discrimination, in fostering a military that is politics-neutral and disciplined, and in recruiting and sustaining an all-volunteer force of sufficient strength and quality to provide for the nation's security and to sustain that security over time.

- Speech activities conducted through social media and electronic communication, under certain circumstances, can prejudice good order and discipline, bring discredit upon the armed forces, or both. For example, broadcasting or distributing sexually-explicit or intimate images of others without their consent is not only inconsistent with our core values and culture of dignity and respect, but its impact on victims can be devastating. Online activities such as distributing extremist or racist materials to unit members, or urging military members to refuse to obey lawful orders, degrade unit cohesion and military readiness on both the individual and unit levels. This type of behavior directed at others within a military organization is detrimental to morale, destroys trust, demonstrates disrespect for the chain of command, and impairs military effectiveness.
- Such online behavior may also discredit the Department of the Air Force because members of the general public that view posts offensive to a reasonable person may find the Air Force or Space Force a disreputable institution, or one deserving less than full public esteem and respect, or that such actions are acceptable in the Air Force or Space Force. Activity which may be viewed as racist, undisciplined, or untrustworthy, can negatively affect the civilian community's tolerance and support of essential military missions, as well as impact recruiting and retention efforts.
- Military members are viewed, even if through social media or electronic communications, as representatives of the United States. Accordingly, military members are prohibited from discussing protected national security, official use, and personal information to which they may be privy as a member of the Air Force or Space Force and DoD except as permitted by law.
- Political Communication: Airmen and Guardians, in their personal capacity, may engage in political discussions through social media, but may not engage in political discussions that include non-public information or the intricacies of the Department of the Air Force or the DoD
 - Airmen and Guardians must be careful that personal opinions and activities are not directly, or by implication, represented as those of the Air Force or Space Force
 - If, when expressing a personal political opinion, personnel are identified by a social media site as DoD employees (i.e., the "work and education" section on a Facebook profile lists "United States Air Force" or "United States Space Force"), the posting must clearly and prominently state that the views expressed are those of the individual only and not of the DoD or the Air Force or Space Force
 - Active duty military members and certain restricted civilian employees are prohibited from participating in partisan political activity. Consult AFI 51-508, *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel*, for more detailed discussion.

REFERENCES

- Political Activity Authorized; Prohibitions, 5 U.S.C. § 7323
- Pickering v. Bd. of Educ., 391 U.S. 563 (1968)
- 5 C.F.R. 734.208, *Participation in Fundraising*
- 5 C.F.R. 2635.701-705, *Misuse of Position*
- 5 C.F.R. 2635.807, *Teaching, Speaking, and Writing*
- 5 C.F.R. 2635.808, *Fundraising Activities*
- DoDI 1304.33, *Protecting Against Inappropriate Relations During Recruiting and Entry Level Training* (28 January 2015), incorporating Change 1, 5 April 2017
- DoDD 1344.10, *Political Activities by Members of the Armed Forces* (19 February 2008)
- Hatch Act Advisory Opinions and Guidance, <https://osc.gov/Services/Pages/HatchAct-Policies.aspx>
- AFI 1-1, *Air Force Standards* (7 August 2012), incorporating Change 1, 12 November 2014
- AFI 17-130, *Cybersecurity Program Management* (13 February 2020)
- DAFI 35-101, *Public Affairs Operations* (20 November 2020)
- AFI 36-703, *Civilian Conduct and Responsibility* (30 August 2018)
- AFI 36-2710, *Equal Opportunity Program*, (18 June 2020), including AFI36-2706_AFGM2020-01, 9 September 2020
- AFI 36-2909, *Air Force Professional Relationships and Conduct* (14 November 2019)
- AFI 51-508, *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel* (12 October 2018)

FREEDOM OF INFORMATION ACT (FOIA)

The Freedom of Information Act (FOIA) is a disclosure statute that permits access to information maintained by government agencies. The basic goals of the FOIA are to ensure an informed citizenry, to serve as a check against corruption, and to help hold the government accountable. The Act applies to the Department of Defense (DoD), Department of the Air Force, and other federal executive agencies. Enacted in 1966, FOIA generally provides a right of access to federal executive agency information, except records (or portions) that are protected from disclosure by one of the FOIA exemptions provided in the statute.

FOIA Exemptions

- There are nine FOIA exemptions. Seven of the exemptions are most applicable to requests for Department of the Air Force records.
 - Classified information (e.g., confidential, secret, top secret). “For Official Use Only” is not a security classification.
 - Matters relating solely to the internal personnel rules and practices of the agency
 - Information exempted by another statute (e.g., drug rehabilitation information, or information protected by the Privacy Act)
 - Trade secrets or commercial or financial information submitted on a privileged or confidential basis (e.g., bid contract proposals)
 - Inter or intra-agency documents normally privileged in the civil court context (e.g., attorney work-product and pre-decisional policy discussions)
 - Information in personnel, medical, and similar files which, if disclosed to the requester, would result in a clearly unwarranted invasion of personal privacy
 - Some examples of personal information which are releasable because there is no unwarranted invasion of personal privacy are: name, rank, date of rank, gross pay, present and past duty assignments, future assignments which have been finalized, office/organizational address, and duty phone number. However, the names and addresses (postal and/ or e-mail) of DoD military and civilian personnel in sensitive units, routinely deployable units, or assigned in foreign territories are normally not releasable.
 - Information not normally releasable as an unwarranted invasion of personal privacy includes home addresses, home phone numbers, and social security numbers
 - Records created for law enforcement purposes (e.g., information that would disclose the identity of confidential informants)

FOIA Requests

- When a FOIA request is received, immediately submit the request to the base FOIA office for processing. By law, the agency must respond to the requester within 20 working days of receiving a perfected FOIA request.
- The FOIA request can be made by “any person,” which has been broadly defined to include foreign citizens and governments, corporations, and state governments. To comply with the rules, the request must:
 - Be in writing (includes requests sent by facsimile, or electronically)
 - Explicitly or implicitly invoke the FOIA

- Reasonably describe the desired record
- Give assurances to pay any required fees or explain why a waiver is appropriate

FOIA Processing

- The office of primary responsibility (OPR) (not the FOIA office or the servicing staff judge advocate (SJA)) is responsible for conducting an initial review of the responsive records and making proposed redactions based on the exemptions in the FOIA discussed above.
- After initial review, forward to the SJA for comment
 - If the SJA recommends approval, local release authority can approve request and release information
 - If the SJA recommends denial, then a legal review is attached and the case is forwarded immediately to the initial denial authority (IDA), typically the major command (MAJCOM) commander or designee
 - For FOIA requests involving records of the Air National Guard (ANG) and its military personnel and technicians (except Inspector General (IG) records), the State Adjutant General is the RELEASE authority and the Chief, National Guard Bureau is the DENIAL authority
- The IDA takes appropriate action. If records are denied, wholly or in part, the IDA tells requester the reason for the denial and the appeal procedure to follow. The IDA must issue its decision within 20 working days of receipt of the request by the base FOIA office.
- Appeals are taken to SAF/GCA for resolution after being reassessed by the MAJCOM FOIA office
- Requester may file suit in federal district court to compel the release of the requested information if the appeal results in denial
- Agencies are not required to create, compile, or obtain records not already in their possession to comply with a FOIA request. However, as a matter of DoD policy, they are required to make reasonable efforts to extract data from existing records to comply with a FOIA request, so long as such an extraction is within the agency's normal business practices; or, if not a normal business practice, would not be unduly burdensome.
- Honoring form or format requests: In making any record available to a person, the agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Agencies are required to make reasonable efforts to maintain their records in forms or formats that are reproducible and have an affirmative duty to search for records in electronic form or format (e.g., in e-mails).
- Multi-track processing is authorized if the number of pending requests or complexity of a request precludes response within the statutory 20-working day limit. All tracks operate on a first-in, first-out system. If the base FOIA office determines a request is not eligible for its fastest track, it must give the requester the opportunity to limit the scope of the request.
 - Simple Requests: Ones that clearly identify the requested records, have few responsive records, deal with only one installation and, generally, one OPR, and do not involve Privacy Act, classified, or deliberative process materials
 - Complex Requests: Ones that include massive responsive records, cause significant impact on units, require coordination from multiple offices, or include material that is classified or privileged, or originated from a non-government source

- Expedited Track: Agencies are required to promulgate regulations providing for expedited processing of requests for records if the requester demonstrates a “compelling need.” Agencies must notify expedited processing requesters whether the request has been granted within 10 calendar days.
 - A “compelling need” means failure to receive the records in an expedited manner could reasonably be expected to pose an imminent threat to the life or physical safety of an individual or there is an urgency to inform the public concerning actual or alleged federal government activity
 - Denial of a request for expedited processing, whether initially or on appeal, is subject to judicial review
 - Agencies may process “urgently needed” material in the expedited track after “compelling need” requests have been fulfilled

Electronic FOIA Library Rooms

- Department of the Air Force FOIA offices must establish an electronic FOIA Library website and make frequently requested records (records typically requested three or more times per quarter) available through links in the Library website. The Department of the Air Force’s FOIA office has a main FOIA Library reading room link at <http://www.foia.af.mil/Library/>.
- Certain records, such as policy statements, created on or after 1 November 1996, must be made available electronically in a public reading room within one year of creation

REFERENCES

Freedom of Information Act, 5 U.S.C. § 552

Privacy Act, 5 U.S.C. § 552a

DoDD 5400.07, *DoD Freedom of Information Act (FOIA) Program* (5 April 2019),

DoDM 5400.07_AFMAN 33-302, *Freedom of Information Act Program* (27 April 2018)

Department of the Air Force Compliance Division, <http://www.foia.af.mil/Library/>

PRIVACY ACT (PA)

The Privacy Act (PA) is designed to accomplish several purposes. It limits the government's ability to collect information about an individual to those instances authorized by law or executive order and necessary for government business. The PA also authorizes individuals to access records maintained on them by the government and to correct factual errors in those records. The PA only governs activities of the federal executive branch of government.

Basic Structure of PA Systems

- Every PA system of PA records must be listed in the Federal Register before information may be collected from an individual
- A system of records contains information on individuals that is retrieved by a personal identifier such a name, number, or symbol. All systems of records must have a PA warning on them.
 - Do not place PA information in areas where individuals without an official need to know will have access (including office shared drives on computer systems)
 - Personal notes maintained by a supervisor as memory aids at his/her own initiative are not considered a system of records, even if maintained by name or personal identifier, unless the records are required by command policy or regulation, or other action is taken by the individual indicating it is considered to be used for official purposes by other individuals
- Contractors who maintain systems of records for a federal agency are bound by the PA
- Before being required to provide information for a system of records, an individual must be given the opportunity to read the Privacy Act Statement (PAS) for the system of records
 - A PAS references the System of Records Notice (SORN) that was posted in the Federal Register for the system of records and can be posted as a sign or printed and handed to the individual
 - A PAS may also be verbally told to the individual
 - A PAS includes the authority for collecting the information, whether disclosure is voluntary or mandatory, routine uses of the information, and the consequences of not providing the information, if any

Disclosure Procedures

- To the Individual Subject of the Record:
 - Subjects of PA records and their designated representatives may request copies of their records
 - Individuals do not need to state a reason for requesting access
 - System managers must verify the requester's identity
 - Requesters must describe the records they are seeking — “all records on me” is not sufficient — system managers may ask for clarification
 - Requesters **MAY NOT** use government resources to create or send a personal request for records

- To Third Parties:

- The PA normally requires written consent from the subject of the record before releasing information unless a PA exception applies, of which there are twelve
- Exceptions allowing disclosure to third parties without subject consent:
 - To any Department of Defense (DoD) employee with an official need to know to accomplish their DoD duties
 - Disclosure is required by the Freedom of Information Act (FOIA). Consult the servicing staff judge advocate (SJA) and FOIA office before providing information subject to the PA.
 - To agencies outside the DoD, if consistent with the routine uses listed in the Federal Register's system of records notice
 - To the Bureau of the Census
 - Compilations of statistical data where individual data is not identifiable
 - To the National Archives and Records Administration for permanent storage
 - To a federal, state, or local agency for civil or criminal law enforcement action
 - To an individual or agency requiring the information for compelling health or safety reasons
 - To Congress
 - To the Comptroller General
 - To a court of competent jurisdiction in response to a court order from a judge
 - To a consumer reporting agency, if allowed by system of records notice

Denials

- For a PA record to be denied to the individual whose record it is (a first party), it must be covered by a PA "exemption." PA exemptions usually apply to records created for a law enforcement purpose, such as investigative records and background security check records. Testing, promotions boards, and national security systems of records may also qualify for exemptions.
- Only that information in the record covered by the exemption may be denied
- Segregate non-exempt documents and release them
- Third-party information contained in the record may also be redacted depending on the nature of the information and its relevance to the first party's information. Always contact the servicing SJA for guidance on releasing third party information in a PA record to the individual whom the PA record pertains.
- System managers send recommendations for denials to their servicing SJA and PA office for review within five days of receiving the request
- PA records denied, in whole or in part, to a first party requester under the PA are also processed under the FOIA to allow for the maximum release of information to the first party requester

- Commonly encountered limits on release to first party requesters for their own PA record are:
 - Information collected in anticipation of civil litigation or created as attorney work product
 - Information compiled for a law enforcement purpose
 - Medical records which have been reviewed by a doctor before release, and the doctor determines that disclosing the records could cause mental harm or hardship to the requester. In such cases, the medical records may be released to a physician/medical provider of the patient's choosing. Include a letter to that physician with the records explaining the reviewing doctor's basis for not disclosing the records directly to the requester. Consult AFMAN 41-210, *Tricare Operations and Patient Administration*, and DoDM 6025.18, *Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule Compliance in DOD Health Care Programs*, for additional guidance regarding the release of medical records.

Special Handling Requirements

- Medical Records of Minors:
 - Normally a parent or legal guardian may have access to their minor child's medical records. However, several exceptions may apply wherein a parent is not legally permitted to view their child's medical records.
 - Confidentiality of the minor: If overseas and the minor is between ages 15 and 17, do not release a minor's medical records to the minor's parents or legal guardians without court order or consent from the minor, **IF** regulation or statute provides for confidentiality of the records and the minor has asked for confidentiality
 - Within the territorial United States, state laws may limit parental access to medical records of their children, based on age, type of medical care, or other factors such as allegations of abuse against the parent. Consult with the servicing SJA for state specific requirements.
- Handling PA Records:
 - When transmitting PA material using e-mail, the sender must include a warning that the e-mail contains PA material and is for official use only For Official Use Only (FOUO) or Controlled Unclassified Information (CUI) at the beginning of the message and include "FOUO" or "CUI" at the beginning of the subject line
 - Do not place PA material on internet sites accessible by individuals without an official need to know the information

Violations

- Individuals to whom the PA record pertains (first party requesters) may file suit in civil court to gain access to PA materials and correct errors in those materials. The court may award attorney's fees, court costs, and damages.
- Individuals may be criminally prosecuted for willful, unauthorized disclosures of PA information or maintenance of an unauthorized system of records both by civilian authorities and under the Uniform Code of Military Justice (UCMJ)

REFERENCES

Privacy Act of 1974, 5 U.S.C. § 552a

DoD 5400.11-R, *Department of Defense Privacy Program* (14 May 2007)

DoDM 6025.18, *Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule Compliance in DOD Health Care Programs* (13 March 2019)

AFI 33-332, *Air Force Privacy and Civil Liberties Program* (10 March 2020), with correction actions applied, 12 May 2020

AFMAN 41-210, *Tricare Operations and Patient Administration* (10 September 2019)

DELIVERY OF MILITARY PERSONNEL, EMPLOYEES, AND FAMILY MEMBERS TO CIVILIAN AUTHORITIES FOR TRIAL

Congress requires the Armed Services to have uniform regulations for delivering military members accused of a crime to U.S. civilian authorities. Department of Defense (DoD) regulations require cooperation with federal and state officials who request assistance to enforce court orders pertaining to the witness testimony or in-court appearance of a military member, employee, or family member stationed overseas. Department of the Air Force policy further extends this cooperation to military members stationed within the United States.

Adherence to Court Orders to Testify

- Department of the Air Force members, civilian employees, and family members are expected to comply with orders issued by a federal or state court of competent jurisdiction unless non-compliance is legally justified. Members and employees who persist in non-compliance are subject to adverse administrative action, including separation for cause.
- Department of the Air Force officials will ensure that members, employees, and family members do not use assignments or officially sponsored residences outside the United States to avoid complying with valid court orders. Failure of a family member located outside the United States to comply with a court order may be the basis for withdrawal of command sponsorship from the family member.

Initial Actions Following Report of Service Member Arrest by Civilian Authorities

- When a commander receives notice from any source (e.g., a unit member, security forces (SF), or the Air Force Office of Special Investigations (AFOSI)) that a member of his or her command is being held by civilian authorities or is charged with a criminal offense, he or she should take prompt action
- The commander or a representative of the unit should contact the civilian authorities, inform them the person is a military member, and gather the following information:
 - The charge against the member;
 - The facts and circumstances surrounding the charged offense; and
 - The maximum punishment the member faces
- If possible, make arrangements for the member's return to military control
 - **DO NOT** state or imply that the Air Force or Space Force will guarantee the member's presence at subsequent hearings
 - **DO NOT** post bond for the member or personally guarantee any action by the member

Release of Criminal Jurisdiction by Civilian Authorities to Military Authorities

- When a military member commits an offense off base in violation of both civilian (state law) and military law (which is federal law) (e.g., rape, robbery, murder), the member is subject to prosecution by both the state and the military
- While prosecution by both the state and federal governments for the same offense is constitutionally permissible (separate sovereigns so not double jeopardy), Department of the Air Force policy is that if the state is prosecuting a member for an offense, the Department of the Air Force will not take Uniform Code of Military Justice (UCMJ) action against the member without approval of the Secretary of the Air Force (SecAF)

- Department of the Air Force policy is to request criminal jurisdiction from applicable civilian authorities for any qualifying offenses (offenses also under military law) by service members
 - The determination of which sovereign (state or federal) shall exercise jurisdiction should be made through consultation or prior agreement between appropriate Department of the Air Force and civilian authorities
 - Off-base offenses committed by a military member on active duty may be tried by court-martial or civilian courts. The question of personal military jurisdiction turns on the military status of the offender at the time of the offense, not where the offense occurred.
 - The court-martial convening authority will often request that the civilian authorities waive jurisdiction and permit the Department of the Air Force to prosecute the offender
 - The staff judge advocate (SJA) will assist in coordinating with the local authorities
- As a general rule, military status will not be used to avoid orders of civilian courts

Procedure: Delivery of Military Personnel Located Outside the United States

- When federal, state, or local authorities request delivery of an Air Force or Space Force member who is stationed outside the United States and who is convicted of, or charged with, a felony, or who is sought for the unlawful taking of a child, he or she will normally be expeditiously returned to the United States for delivery to the requesting authorities. The office of primary responsibility (OPR) for this process is the AF/JA – Military Justice, Law and Policy Division (JAJM).
 - “Outside the United States” is defined as an area other than one of the 50 states, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, the United States Virgin Islands, or any commonwealth, territory, possession, or insular are of the United States
 - A felony is a criminal offense punishable by incarceration for more than one year, regardless of the sentence actually imposed
 - Requests for delivery of military members to civilian authorities must be accompanied by a warrant or a representation by a federal marshal or agent that such a warrant has been issued
 - Before taking action to return a member under these circumstances, the member must be afforded an opportunity to show legitimate cause for non-compliance
 - A general court-martial convening authority (GCMCA), or an installation or equivalent commander if designated by the GCMCA, may order a military member to return expeditiously, at government expense, to an appropriate port of entry in the United States if the member has been convicted of, or charged with, a felony, has been held in contempt, or who is sought for the unlawful taking of a child
 - The Judge Advocate General (TJAG) may direct return of members for less serious offenses when deemed appropriate under the facts and circumstances of a particular case
 - Return is not required if the controversy can be resolved without returning the member to the United States
 - If approved, the member receives permanent change of station (PCS) orders from the Air Force Personnel Center (AFPC) with an assignment to an installation as close to the requesting jurisdiction as possible
 - Requesting authorities will be notified of member’s new assignment, port of entry, and estimated time of arrival

- On or before delivery, the commander authorizing the delivery will provide the military member an instruction letter in substantially the form set out in Attachment 2, AFI 51-205, *Delivery of Personnel to United States Civilian Authorities for Trial and Criminal Jurisdiction Over Civilians and Dependents Overseas*
- On or before delivery, the requesting authority must execute an acknowledgement and agreement in substantially the form set out in Attachment 3, AFI 51-205
- A request for return of a member to the United States by civilian authorities may be denied if any of the following exist:
 - Member's return would have an adverse impact on operational readiness or mission requirements
 - An international agreement precludes the member's return
 - Member is subject to foreign judicial or court-martial proceedings or a military department investigation
 - Member shows satisfactory evidence of legal efforts to resist the request or other legitimate causes for non-compliance
 - Other unusual facts or circumstances warrant a denial
- Commanders send recommendations for denial through their legal office to JAJM, SecAF's General Counsel (SAF/GC), SecAF's Manpower and Reserve Affairs Office (SAF/MR), and DoD General Counsel (DoD/GC). The Under Secretary of Defense for Personnel and Readiness [USD(P&R)] is the denial authority for a felony offense or contempt involving the unlawful or contemptuous removal of a child from the jurisdiction of the lawful custodian. TJAG is the denial authority in all other cases.
- Requests must be processed expeditiously. A delay of up to 90 days may be granted by TJAG if any of the following apply:
 - Efforts are in progress to resolve the controversy without the member's return
 - Additional time is required to permit the member to provide satisfactory evidence of legal efforts to resist the request or show legitimate cause for non-compliance
 - Additional time is needed to determine the mission impact of the member's loss or impact on any international agreement, foreign judicial proceeding or ongoing military department investigation or court-martial
 - Other unusual facts or circumstances warrant delay

Procedure: Delivery of Military Personnel Located Within the United States

- Requests for, and delivery of, military personnel located within the United States generally follow the same procedures outlined above for the return of members overseas
- However, a GCMCA may not authorize the transfer of a member from one state to another until the proper extradition proceedings are complete. If state or local civilian authorities request the delivery of a military member located in another state, the requesting authorities must follow normal extradition procedures

Physical Restraint or Confinement Pending Delivery

- A Department of the Air Force member may be placed under physical restraint or confinement by his or her commander pending delivery to civilian authorities, provided there is a reasonable belief that the member committed the offense and a reasonable belief that restraint or confinement is necessary

Civilians Associated with the Department of the Air Force

- Commanders ordinarily do not have authority to compel civilian compliance with court orders, but will strongly encourage civilians associated with their organizations to comply with valid orders of federal and state courts, to include the use of adverse administrative actions against civilian employees and withholding of official command sponsorship for military dependents, where appropriate

Military Members in Civilian Custody or Post-Conviction

- An AF Form 2098, *Duty Status Change*, reflecting a duty status change must be prepared and forwarded to the military personnel flight when a member is in civilian custody
- If the member is convicted of an offense which would, if tried by court-martial, subject the member to a punitive discharge, the member is subject to involuntary administrative separation from the Air Force or Space Force with a less than “honorable” service characterization (i.e., under honorable conditions (general) or under other than honorable conditions” (UOTHC) discharge)
- If the member is convicted of an offense (or one closely related to an offense under the UCMJ) that would, if tried by court-martial, subject the member to a punitive discharge and confinement for one year or more, the commander **MUST** either recommend involuntary separation or submit a request for waiver of discharge. The decision should be made promptly, as an extended period of inaction may result in a waiver of the right to process the member for separation.
 - The member’s absence due to confinement in a civilian facility does not bar processing the member for separation, but an approved discharge may not be executed until the member is released and returned to the United States
 - The commander must obtain information from the civilian authorities concerning the final disposition of the case. The SJA, with the SF or AFOSI, will assist.
 - If a member is charged with or convicted of an offense that does qualify for or warrant separation, various disciplinary actions, such as unfavorable information file (UIF), control rosters, or administrative reprimands, may still be appropriate. Consult with the SJA.

REFERENCES

UCMJ art. 14

DoDI 5525.09, *Compliance with Court Orders by Service Members and DoD Civilian Employees, and Their Family Members Outside the United States* (23 April 2019)

DoDI 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* (3 March 2005)

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), incorporating through Change 6, 18 October 2011, including AFI 36-3207_AFGM2020-01, 1 July 2020

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2020-01, 1 July 2020

AFI 51-205, *Delivery of Personnel to United States Civilian Authorities for Trial and Criminal Jurisdiction Over Civilians and Dependents Overseas* (10 September 2018)

AF Form 2098, *Duty Status Change* (30 June 2003)

CITIZENSHIP FOR MILITARY MEMBERS

The Immigration and Nationality Act (INA) provides naturalization options for military members and certain veterans of the U.S. military. Foreign nationals who are serving or have served in the U.S. military may pursue naturalization through peacetime military service (10 U.S.C. § 1439(a)), through military service during a period of hostilities (10 U.S.C. §1440(a)) or naturalization may be pursued posthumously for members who served during a designated period of hostilities (10 U.S.C. § 1440-1). Although 8 U.S.C. 1440(a) allows a member's citizenship application to be accelerated for active service, non-activated Air National Guard (ANG) service does not qualify a member for accelerated citizenship.

Naturalization through Peacetime Service

- A member who has served honorably in the U.S. Armed Forces at any time may be eligible to apply for naturalization under Section 328 of the INA (10 U.S.C. § 1439(a)). The military community refers to this as "peacetime naturalization."
- In general, an applicant for naturalization based peacetime service must:
 - Be age 18 or older
 - Have served honorably in the United States Armed Forces for at least one year and, if separated from the United States Armed Forces, have been separated honorably
 - Be a lawful permanent resident at the time of examination on the naturalization application
 - Be able to read, write, and speak English
 - Demonstrate knowledge of United States history and government (civics)
 - Have been a person of good moral character for at least five years prior to filing the application until the time of his or her naturalization
 - Have an attachment to the principles of the United States Constitution and be well disposed to the good order and happiness of the United States during all relevant periods under the law
 - Have continuously resided in the United States for at least five years and have been physically present in the United States for at least 30 months out of the five years immediately preceding the filing date of the application, **UNLESS** the applicant has filed an application while still in the service or within six months of an honorable discharge. In the latter case, the applicant is not required to meet these residence and physical presence requirements.

Naturalization through Qualifying Service During Periods of Hostilities

- Members of the U.S. Armed Forces who serve honorably during specifically designated periods of hostilities are eligible for naturalization under Section 329 of the INA (10 U.S.C. § 1440)
- In general, an applicant for naturalization based on service during a period of hostilities must:
 - Have served honorably in an active duty status for at least 180 consecutive days (inclusive of basic military training), or as a member of the Selected Reserve of the Ready Reserve for one year (inclusive of basic military training), during a designated period of hostilities and, if separated from the U.S. Armed Forces, have been separated honorably
 - Members who are serving in a location designated as a combat zone, a qualified hazardous duty area, or an area where service in the area has been designated to be in direct support of a combat zone, and which also qualifies the member for hostile fire or imminent danger pay will be eligible to apply for U.S. citizenship after completing only one day of active duty service following successful completion of basic training

- Have been lawfully admitted as a permanent resident **OR** have been physically present in the United States or certain territories at the time of enlistment or induction (regardless of whether the applicant has been admitted as a permanent resident)
- Be able to read, write, and speak basic English
- Demonstrate knowledge of United States history and government (civics)
- Demonstrate good moral character for at least one year prior to filing the application until the time of his or her naturalization
- Have an attachment to the principles of the United States Constitution and be well disposed to the good order and happiness of the United States during all relevant periods under the law
- An applicant who files on the basis of military service during hostilities is exempt from the general naturalization requirements of continuous residence and physical presence
- There is no minimum age requirement for an applicant under this section
- The designated periods of hostilities are:
 - 6 April 1917 – 11 November 1918
 - 1 September 1939 – 31 December 1946
 - 25 June 1950 – 1 July 1955
 - 28 February 1961 – 15 October 1978
 - 2 August 1990 – 11 April 1991
 - 11 September 2001 – Present
- Current designated period of hostilities starting on 11 September 2001 will terminate when the President issues an Executive Order terminating the period

Posthumous Citizenship for Military Members

- Members who served honorably in the U.S. Armed Forces and who died as a result of injury or disease incurred while serving in an active-duty status during specified periods of military hostilities, as listed above, may be eligible for posthumous citizenship under section 329A of the INA (10 U.S.C. § 1440-1)
- Form N-644, *Application for Posthumous Citizenship*, must be filed on behalf of the deceased service member within two years of his/her death. If approved, a Certificate of Citizenship will be issued in the name of the deceased veteran establishing posthumously that he/she was a U.S. citizen on the date of his/her death. The form may be accessed at <https://www.uscis.gov>.

Application Processing

- Service members must apply for naturalization through the U.S. Citizenship and Immigration Services (USCIS). Service members are not charged filing or biometrics fees associated with the naturalization process.
- Every military installation should have a designated point of contact to assist members with completing Form N-400, *Application for Naturalization*, and Form N-426, *Request for Certification of Military Naval Services*. The forms may be accessed at <https://www.uscis.gov>.
- In addition to the N-400 and N-426, the member must enclose a copy of his or her military orders and a photocopy of both sides of his or her Permanent Resident/Green Card (Form I-551, *Permanent Resident Card*)

- Only an O-6 or higher in the member's Chain-of Command, or a GS-15 and above "with proper authorization," can certify the N-426. Certification cannot be delegated down the chain and the certifying official must state on the N-426 that his or her certification was based on a personal review of the member's service record.
 - Honorable service cannot be certified if the member is the subject of any pending disciplinary actions, pending administrative actions or proceedings, or is the subject of a law enforcement or command investigation. Additionally, honorable service cannot be certified if the member has not completed all screening and suitability requirements as defined by the Office of the Under Secretary of Defense (OUSD) for Personnel and Readiness (P&R)'s 13 October 2017 Memorandum titled *Certification of Honorable Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces for Purposes of Naturalization*.
- Members must submit their application for naturalization, along with all supporting documents, to the USCIS' specialized military naturalization unit for expedited processing: USCIS, P.O. Box 4446, Chicago, IL 60680-4446

REFERENCES

Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*

Naturalization through Service in the Armed Force, 8 U.S.C. § 1439(a)

Naturalization through Active Duty Service ... Periods of Military Hostilities, 8 U.S.C. § 1440

I-551, *Permanent Resident Card*

N-400, *Application for Naturalization* (17 September 2019)

N-426, *Request for Certification of Military or Naval Services* (1 March 2021)

N-644, *Application for Posthumous Citizenship* (10 November 2020)

DoDI 5500.14, *Naturalization of Aliens Serving in the Armed Forces of the United States and of Alien Spouses and/or Alien Adopted Children of Military and Civilian Personnel Ordered Overseas* (4 January 2006)

OUSD (P&R) Memorandum, *Certification of Honorable Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces for Purposes of Naturalization* (13 October 2017)

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THE DEPARTMENT OF THE AIR FORCE URINALYSIS PROGRAM

The purpose of the Department of the Air Force urinalysis program is to assist commanders in ensuring their troops are mission ready by deterring Air Force and Space Force members from using illegal drugs and other illicit substances. AFMAN 44-197, *Military Drug Demand Reduction Program*, sets forth standards and procedures regarding Drug Demand Reduction (DDR) activities of Department of the Air Force military personnel. AFMAN 44-197 applies to military personnel of the Regular Air Force (RegAF), Air Force Reserve (AFR), and Air National Guard (ANG).

Objectives

- Identifying individuals who use and abuse illegal drugs and other illicit substances
- Providing a basis for action, adverse or otherwise, against a member based on a positive test result
- Enhance mission readiness and foster a drug free environment through a comprehensive program of education, prevention, deterrence and community outreach in support of the President's National Drug Control Strategy

Procedures

- Close command coordination with legal, law enforcement, and other agencies is required for an effective urinalysis program
 - Carefully controlled and standardized collection, storage, and shipment procedures, supported by a legally defensible chain of custody, are required by directive and instruction to ensure the integrity of the program
 - If proper procedures are not followed, then use of urinalysis test results in Uniform Code of Military Justice (UCMJ) or administrative actions may be limited or, in some cases, prohibited

Air Force Drug Testing Laboratory (AFDTL)

- With the exception of urine samples tested for steroids and other nonstandard drugs of abuse, nearly all Department of the Air Force member urine samples are tested at the Air Force Drug Testing Laboratory (AFDTL) located at Joint Base San Antonio-Lackland, Texas. Some member samples are tested at the Forensic Toxicology Drug Testing Laboratory at Tripler Army Medical Center, Hawaii, due to geographic proximity.
- The AFDTL can test for the presence of cocaine, amphetamines/methamphetamine, marijuana, lysergic acid diethylamide (LSD, "acid"), designer or analog amphetamines (to include MDMA (Ecstasy), MDA and MDEA), 6-MAM (heroin metabolite), opiates (codeine, morphine, hydrocodone, hydromorphone), benzodiazepines, opioids (oxycodone, oxymorphone), and synthetic cannabinoids (e.g., "Spice")
- The AFDTL uses a DoD prescribed combination of analytic techniques to determine whether or not samples are positive for various drugs
 - Each sample must undergo at least two tests before it may be considered positive: (1) screen and (2) confirmation
 - Screen Test: Conducted primarily using immunoassay testing, with occasional directed screen testing done using liquid chromatography/tandem mass spectrometry (LC-MS/MS)
 - Confirmation Test: Gas chromatography/mass spectrometry (GC/MS) or LC-MS/MS is used for all confirmation testing

- The Department of Defense (DoD) prescribes a minimum level beyond which a test is reported as positive
 - Only samples that test positive above the DoD minimum level on every test are reported as positive
 - Samples not testing positive on any screen test or on the confirmation test are discarded

Urinalysis Testing

In addition to unit administered random drug testing, there are five common situations that may require urinalysis testing: consent, probable cause, commander directed, inspection, and medical care. Each of these has its own legal considerations for when it can be taken and how it can be used so consult with the servicing staff judge advocate (SJA) before determining which situation to use. Coordination with the 201st Mission Support Squadron (MSS) is strongly encouraged prior to drug testing any ANG member in Title 10 status.

- Consent:

- Prior to a probable cause or commander directed urinalysis test, the member should first be asked if he or she will consent to a urinalysis test
- When practicable, consent should be given in writing, using an AF Form 1364, *Consent for Search and Seizure*
- Commanders are not required to give Article 31, UCMJ, rights prior to asking for consent. However, evidence that a member was read these rights may be used to help demonstrate that any consent obtained was voluntary on the part of the member
- Results of consent searches and seizures may be used for UCMJ and/or administrative actions, including adverse service characterizations of administrative discharges

- Probable Cause:

- To have probable cause there must be a *reasonable* belief that illegal drugs, or drug metabolites, will be present in the individual's urine
- Requires a search and seizure authorization from a military magistrate or a neutral and detached commander with authority over the person being searched to seize a urine specimen
- Results of probable cause searches and seizures may be used for UCMJ and/or administrative actions, including adverse service characterizations of administrative discharges

- Commander Directed:

- Appropriate where the member displays strange, bizarre, or unlawful behavior or where the commander suspects or has reason to believe drugs may be present, but probable cause does not exist
- Drug rehabilitation testing is commander directed
- Results obtained through commander directed testing can be used as a basis for administrative discharge action (honorable discharge service characterization only) or to support administrative actions such as letters of reprimand (LORs) and promotion propriety actions
- Commander directed test results **CANNOT** be used to take UCMJ action, such as court-martial or nonjudicial punishment (NJP), and/or to adversely characterize administrative discharges. **Exception:** Commander directed test results may be offered for impeachment purposes or in rebuttal in any proceeding in which a service member first introduces evidence in a proceeding to infer or support a claim of non-use of drugs.

- Inspection:

- Urine specimens may be ordered and collected as part of an inspection under Military Rule of Evidence 313(b)
- The primary purpose of an inspection is to determine and ensure the security, military fitness, or good order and discipline of the unit. This may include an inspection to determine whether the command is functioning properly, if proper standards of readiness are maintained, and if personnel are present, fit, and ready for duty.
- Sometimes called a “unit sweep,” an entire unit or a part of the unit may be inspected, or an individual may be directed to participate in a base-wide random selection process. ANG units will conduct random testing during regularly scheduled drill days and/or during the member’s annual tour (AT).
- Individual members **MAY NOT** be singled out for inspection (especially as a means to work around a lack of consent or probable cause)
- **DO NOT** use an inspection when you suspect a specific individual of drug abuse. Consult the SJA for more appropriate options.
- Coordinate inspections with the installation Drug Demand Reduction Program Manager (DDRPM). Do not announce the inspection in advance to those being inspected.
- Inspection testing is the best deterrent available against drug abuse
- Results may be used for UCMJ and/or administrative actions, including adverse service characterizations of administrative discharges

- Medical Care:

- A urine specimen collected as part of a patient’s medical treatment (for a valid medical purpose), including a routine physical, may be subjected to urinalysis drug testing
- Results may be used for UCMJ and/or administrative actions, including adverse service characterizations of administrative discharges
- Members may not be disciplined under the UCMJ when they legitimately self-identify for drug abuse and enter the Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program

- Post-Mishap Toxicology Testing:

- After certain mishaps, involved personnel are required to provide blood and urine samples for testing as part of the safety investigation, IAW DAFI 91-204, *Safety Investigations and Reports*. Both the urine and blood samples are typically taken by the medical treatment facility (MTF).
- This testing is an inspection, not a search or commander-directed test. Positive test results are handed over to the safety investigation convening authority for appropriate law enforcement investigation.

Positive Results

- Upon receipt of a positive test report, regardless of type of test (with the exception of post-mishap toxicology results), immediately contact the SJA
- A commander's options following a positive drug testing result depend in great part on the basis for the testing. Authorized actions are outlined in Table 9.1 of AFMAN 44-197.
- Authorized administrative actions following a positive drug test result include, but are not limited to, letters of admonishment (LOAs), counseling (LOCs) and reprimand (LORs), denial of re-enlistment, removal from Personnel Reliability Assurance Program (PRP) status, removal from duties involving firearms, removal from flying status or sensitive duties, suspension of security clearance, and removal of restricted area badges. Commanders must consult the local servicing SJA prior to initiating any disciplinary or adverse administrative actions based on the results of drug testing.
- Upon notification of a positive urinalysis test, AFOSI or SFS will schedule an interview with the service member. Do not advise the service member in advance of the interview of the positive test result.

REFERENCES

Military Rules of Evidence 312-316 (2019)

DoDI 1010.01, *Military Personnel Drug Abuse Testing Program (MPDATP)* (13 September 2012), incorporating Change 1, 14 February 2018

DoDI 1010.16, *Technical Procedures for the Military Personnel Drug Abuse Testing Program* (15 June 2020)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2020-01, 1 July 2020

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018), incorporating Change 1, 21 November 2019, Corrective Actions Applied, 19 December 2019

AFMAN 44-197, *Military Drug Demand Reduction Program* (30 July 2019), including AFMAN44-197_AFGM2020-01, 7 July 2020

DAFI 91-204, *Safety Investigations and Reports* (10 March 2021)

AF Form 1364, *Consent for Search and Seizure* (5 August 2019)

URINALYSIS CHECKLIST FOR UNIT COMMANDERS

Note: This checklist is intended to alert commanders to important urinalysis inspection issues. It is not a complete checklist, nor is it intended to replace or supersede any local or higher headquarters checklist(s) or guidance pertaining to urinalysis inspections.

Generally

- Do you brief the consequences of drug abuse at commander's calls? Do you consult the staff judge advocate (SJA) before you do so? Do you invite a judge advocate to speak?
- Do you ensure that all military members, regardless of rank or status, are subject to inspection testing?
- Do you restrict knowledge of unit or random inspections only to those individuals with a "need-to-know"?

Personnel

- Are tests coordinated with the Drug Demand Reduction Program Manager (DDRPM) or Drug Testing Program Administrative Manager (DTPAM)?
- Do you coordinate all inspections and searches (e.g., unit sweeps, consent, probable cause, and commander directed testing) with the SJA?
- Have you chosen credible people to serve as trusted agent and urinalysis observers in the program in accordance with AFMAN 44-197, *Military Drug Demand Reduction Program*?
 - Is the trusted agent someone of unquestionable integrity and trustworthiness?
 - Have you reviewed the personnel information files (PIFs) of the trusted agent and observers and determined they have no Unfavorable Information File (UIF), history of conviction by prior courts-martial or civilian court (within the previous five years), nonjudicial punishment (NJP), Letter of Reprimands (LORs), or similar administrative action for misconduct involving dishonesty, fraud, or drug abuse?
 - Have you ensured no trusted agent or observer has any pending criminal action, either Uniform Code of Military Justice (UCMJ) or otherwise, or any administrative action pertaining to drug abuse, dishonesty, fraud, or other integrity offenses?
 - Do all observers have more than six months remaining time in service until either separation or retirement from active duty (one year from separation or transfer from active participation status for Air Reserve Component (ARC) members)?
 - Have you ensured that the trusted agent and observers have no medical or mental health conditions that could prevent them from performing observer duties?
 - Are the observers either commissioned officers or non-commissioned officers (NCOs)? If a member in the grade of E-4 is selected, have you obtained the concurrence of the SJA?
 - Are there enough observers, both male and female, to accommodate the number of individuals being tested? Have arrangements been made for additional observers to meet unexpected requirements?
 - Have you ensured that no observer is assigned to work in any legal office?

Notifications

- Do you personally sign the written order to each member directing each inspection?
 - If not, are you personally aware of the identity of each member who has been randomly selected before a pre-signed letter (by you) is issued to the member by the trusted agent?
- Do you notify members no sooner than two hours prior to collection time?
 - Do you require each member to properly acknowledge (date, time, and member signature), in writing, receipt of the order?
 - If a member refuses to acknowledge receipt of the order, does the person serving the order document the member's refusal?
- Do you ensure copies of such orders are maintained within the unit?
- Do you ensure that all members selected for testing report to the collection site within the designated collection time on the written order?
- Do you make sure shift workers or personnel on scheduled "days off" report for testing on their next duty day?

Other Considerations

- Do you make sure members who are unavailable for testing due to leave, pass, temporary duty assignment (TDY), quarters, flying status, crew-rest, missile duty, or non-duty status are tested upon return of the member to duty? Do you coordinate this with the DDRPM?
- Do you seek advice and assistance from the SJA regarding members who fail or refuse to provide a sample?
- Do you immediately contact the SJA for advice and assistance regarding all positive test results?

REFERENCE

AFMAN 44-197, *Military Drug Demand Reduction Program* (30 July 2019), including AFMAN44-197_AFGM2020-01, 7 July 2020

FRATERNIZATION AND UNPROFESSIONAL RELATIONSHIPS

AFI 36-2909, *Air Force Professional Relationships and Conduct*, sets out a detailed discussion of Department of the Air Force policy concerning fraternization and unprofessional relationships.

Overview

- Professional relationships are essential to the effective operation of all organizations. The nature of the military mission requires absolute confidence in command and an unhesitating adherence to orders that may result in inconvenience, hardships, or, at times, injury or death.
- Personal relationships become matters of official concern when they adversely affect or have the reasonable potential to adversely affect the Air Force or Space Force by eroding morale, good order, discipline, respect for authority, unit cohesion, or mission accomplishment

Unprofessional Relationships

- Unprofessional relationships, whether pursued on or off duty, are those relationships that detract from the authority of superiors or result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests
- Unprofessional relationships can exist between officers, between enlisted members, between officers and enlisted members, and between military personnel and civilian employees or contractor personnel
- Certain kinds of personal relationships present a high risk of becoming unprofessional
 - Familiar relationships in which one member exercises supervisory or command authority over another member
 - Shared living accommodations, vacations, transportation, or off-duty interests on a frequent or recurring basis in the absence of any official purpose or organizational benefit
- Tailored rules for unprofessional relationships exist in the recruiting, training, and education environments. These rules draw very specific lines for types of activities a trainer and trainee or a recruiter and a recruit can participate in, locations where they may not be at the same times, and limitations on personal interaction.
 - Additionally, Article 93a, UCMJ prohibits certain sexual activities (any “sexual act” or “sexual contact” as defined by Article 120, UCMJ) with military recruits or trainees by persons in positions of special trust. Consent to the sexual act or sexual contact by the recruit or trainee is not a defense.
- All military members share responsibility for maintaining professional relationships, but the senior member in a personal relationship bears primary responsibility

Fraternization

- Fraternization is a unique form of unprofessional relationship. It exists when a relationship between an officer and an enlisted member puts the enlisted member on terms of military equality with the officer that prejudices good order and discipline or brings discredit upon the armed forces.
- The following officer conduct is specifically prohibited by AFI 36-2909, and may be prosecuted under articles 92, 133, and/or 134 of the Uniform Code of Military Justice (UCMJ), with reasonable accommodation for married members or members related by blood or marriage
 - Officers will not gamble with enlisted members
 - Officers will not lend money to, borrow money from, or otherwise become indebted to enlisted members
 - An exception exists for infrequent, non-interest-bearing loans of small amounts to meet exigent circumstances (e.g., an individual who forgets his or her wallet or purse and cannot pay for lunch at a unit function)
 - Officers will not engage in sexual relations with or date enlisted members
 - In dealing with officer/enlisted marriages, the evidence should first be assessed. When evidence of fraternization exists, the fact that an officer and enlisted member subsequently marry does not preclude appropriate command action based on the prior fraternization.
 - Officers will not share living accommodations with enlisted members except when reasonably required by military operations
 - Officers will not engage, on a personal basis, in business enterprises with enlisted members, or solicit or make solicited sales to enlisted members, except as permitted by DoD 5500.07-R, *Joint Ethics Regulation (JER)*

Retaliation

- Retaliation is considered an unprofessional relationship under AFI 36-2909. This instruction establishes command, supervisory, and personal responsibilities in prohibiting retaliation against an alleged victim or other member of the Armed Forces for reporting a criminal offense. (See the “Retaliation” section of this chapter for further information.)
 - The term retaliation includes *retaliation*, *ostracism*, and *maltreatment*. (See the “Retaliation” section of this chapter for the definitions of each term.)
 - Retaliation against individuals who report criminal offenses is unlawful and erodes good order and discipline, respect for authority, unit cohesion, and, ultimately, mission accomplishment
 - It is the responsibility of commanders and supervisors at all levels to ensure compliance
 - Generally, the policy applies to all active duty members and to members of the Air Force Reserve (AFR) and Air National Guard (ANG)
 - Military members shall not retaliate against an alleged victim or other military member who reports a criminal offense

Command and Supervisory Responsibilities

- A commander or supervisor must take corrective action if a relationship is prohibited by AFI 36-2909 and/or is causing a degradation of morale, good order and discipline, or unit cohesion. Failure to take corrective action may lead to punishment of the commander or supervisor.
 - Action should normally be the least severe necessary to terminate the unprofessional aspects of the relationship
 - Counseling is often an effective first step in curtailing unprofessional relationships. However, the full spectrum of administrative actions should be considered.
 - More serious cases may warrant nonjudicial punishment (NJP)
 - Referral of charges to a court-martial is only appropriate in aggravated cases
 - An order to cease the relationship, or the offensive portion of the relationship, can and should be given. Any order should be in writing, if possible.
 - Officers or enlisted members who violate orders are subject to UCMJ action

REFERENCES

UCMJ, arts. 92, 93a, 132, 133, and 134

DoDI 1304.33, *Protecting Against Inappropriate Relations During Recruiting and Entry Level Training* (28 January 2015), incorporating Change 1, 5 April 2017

DoD 5500.07-R, *Joint Ethics Regulation (JER)* (30 August 1993), incorporating through Change 7, 17 November 2011

AFI 36-2909, *Air Force Professional Relationships and Conduct* (14 November 2019)

HAZING

The Department of Defense (DoD) policy recognizes the adverse effects hazing can have on morale, operational readiness, and mission accomplishment. Hazing is prohibited and should never be tolerated.

Definitions

- Hazing is a form of harassment that includes conduct through which service members or DoD employees, without a proper military or other governmental purpose, but with a connection to military service, physically or psychologically injure or create a risk of physical or psychological injury to service members for the purpose of: initiation into, admission into, affiliation with, change in status or position within, or a condition for continued membership in any military or DoD civilian organization. Hazing can be conducted through the use of electronic devices or communications, and by other means including social media, as well as in person.
- Hazing is evaluated by a reasonable person standard and includes, but is not limited to, the following when performed without a proper military or other governmental purpose:
 - Any form of initiation or congratulatory act that involves physically striking another in any manner or threatening to do the same
 - Pressing any object into another person's skin, regardless of whether it pierces the skin, such as "pinning" or "tacking on" of rank insignia, aviator wings, jump wings, diver insignia, badges, medals, or any other object
 - Department of the Air Force legal guidance on this issue interprets the DoD definitions as not intended to prohibit the traditional "tacking on" portion of the enlisted promotion ceremony where well-wishers tap the cloth rank insignia on the promotee's sleeves as a congratulatory gesture during the promotion. Local commanders may provide more restrictive guidance on this issue, in consultation with guidance from the staff judge advocate (SJA).
 - Oral or written berating of another person for the purpose of belittling or humiliating
 - Encouraging another person to engage in illegal, harmful, or dangerous acts
 - Playing abusive or malicious tricks
 - Branding, handcuffing, duct taping, tattooing, shaving, greasing, or painting another person
 - Subjecting another person to excessive or abusive use of water
 - Forcing another person to consume food, alcohol, drugs, or any other substance
 - Soliciting, coercing, or knowingly permitting another person to solicit or coerce acts of hazing
- A military member or DoD civilian employee may still be responsible for an act of hazing even if there was actual or implied consent from the victim and regardless of the grade/rank, status, or Service of the victim
- Hazing does not include properly directed command activities that serve a legitimate purpose or the requisite training activities required to prepare for such activities (e.g., administrative corrective measures, extra military instruction, or command-authorized physical training)
- Hazing is prohibited in all cases, including off-duty or in "unofficial" celebrations and unit functions and settings

Command Action

- Commanders and senior noncommissioned officers (SNCOs) must promptly and thoroughly investigate all allegations of hazing and take appropriate action if a hazing allegation is substantiated
- A commander's options begin with counseling and reprimands and extend to court-martial for serious cases that involve assault, aggravated assault, maltreatment of subordinates, etc.
- Commanders must evaluate all activities that appear to be an initiation or "rite of passage" to ensure that the dignity and respect of all members are maintained

Punitive Regulations and the Uniform Code of Military Justice (UCMJ)

- There is not a punitive UCMJ article that directly deals with hazing, and the Department of the Air Force does not have a specific punitive regulation that addresses it. However, commanders may pursue disciplinary action under the UCMJ for dereliction of duty and the underlying misconduct, such as assault, battery, maltreatment of subordinates, etc.

REFERENCES

DoDI 1020.03, *Harassment Prevention and Response in the Armed Forces* (8 February 2018), incorporating Change 1, 29 December 2020

AFI 1-1, *Air Force Standards* (7 August 2012), incorporating Change 1, 12 November 2014

PERSONAL FINANCIAL RESPONSIBILITY

Department of the Air Force members are expected to timely and properly satisfy financial and family obligations. Failure to do so can result in administrative or disciplinary action and/or their debt being paid involuntarily by official Department of the Air Force channels.

Commander's Responsibilities

- In cases of financial irresponsibility, the commander shall:
 - Review and assess the basis of any allegation of financial irresponsibility and attempt to respond to complainants within 15 days (Air Force Reserve (AFR) 30 days and Air National Guard (ANG) 60 days). Complainants should be provided attachments 2 and 3 of AFI 36-2906, *Personal Financial Responsibility*, which address involuntary allotments of a member's pay, if appropriate.
 - Advise military member and complainant that the Department of the Air Force has no authority to arbitrate disputed cases of nonsupport or personal indebtedness. Do **NOT** provide information to the complainant regarding administrative or disciplinary action contemplated or taken against the member.
 - Refer members with demonstrated financial irresponsibility to the appropriate base agency for assistance (normally the Airmen and Family Readiness Center (A&FRC) as well as legal assistance at the installation legal office)
 - Consider whether administrative or disciplinary action is appropriate for continuing financial irresponsibility. Consider the action with the appropriate base agencies (e.g., staff judge advocate (SJA))

Financial Support to Dependents

- AFI 36-2906 was revised and republished in 2018. The revision removed the prior ambiguous requirement for military members to provide "adequate support" to their dependents absent a court order or agreement. Instead, Chapter 4 of the revised Air Force instruction includes a pro-rata share requirement and provides more guidance on when support is to be provided and conditions for providing support. When using the pro-rata share in Figure 1.1. of AFI 36-2906, the "total number of supported family members" does not include the military member in the denominator. Additionally, the non-locality basic allowance for housing-with dependent rate will always be used for the calculation.
 - The Department of the Air Force can terminate or recoup the Basic Allowance for Housing (BAH) with dependent rate allowances for those failing to provide adequate financial support to family members
 - Members who falsify support documentation subject themselves to disciplinary or administrative action

Child Support and Alimony Payments

- State courts or state agencies with authority over dependent children can order child support payments. A complainant can either provide a garnishment order to Defense Finance and Accounting Service (DFAS) and receive a portion of the payment directly, or may secure a statutory allotment. Complainants who are Department of Defense (DoD) beneficiaries may consult the legal office for legal assistance.
- Commanders should ensure their military member involved in these processes has access to a legal assistance attorney if they are not already represented by a civilian attorney

Third Party Allotments

- A third party can secure an involuntary allotment from a military member to satisfy a final judgment from a court. The Department of the Air Force has no authority to resolve disputed claims or to require members to pay a private debt without a civil judgment.
 - If a complainant attempts to serve the Department of the Air Force with documents, they should be referred to DFAS. When a request for involuntary allotment is received, DFAS notifies the member and the member's commander.
 - Notification includes the DD Form 2654, *Involuntary Allotment Notice and Processing*, and explains that the allotment will be established against the member's pay if a response is not received within 90 calendar days from the original date of mailing
 - If the member is unavailable to respond, then the member's commander may grant a reasonable extension of time. The commander must notify DFAS and should provide appropriate documentation supporting the "good cause" determination to allow for the extension.
 - In the absence of any additional correspondence from the commander, the allotment application may be processed within 15 calendar days after a response was due
 - If the member is available, the commander will notify the member of the application, provide the member with a copy of the entire application package received from DFAS, and counsel the member on how to complete the DD Form 2654
 - If the military member consents to the allotment, the commander completes the DD Form 2654 and returns the completed form to DFAS and the allotment commences within 30 calendar days
 - If the allotment is contested, the member must fully explain and support the reasons contesting the allotment within 15 calendar days. A list of reasons to contest an allotment is found in DoD 7000.14-R, *Department of Defense Financial Management Regulation*, Volume 7A, *Military Pay Policy – Active Duty and Reserve Pay*, Chapter 41, paragraph 410506.B.1.
 - If the military member fails to respond within the time allowed, the commander notes the failure to respond and notifies DFAS
 - If a member asserts an "exigencies of military duty" defense to the allotment the commander should contact the servicing legal office for further guidance

Bankruptcy

- Filing for bankruptcy protection in federal court is a statutory right of all citizens and does not provide a basis for adverse action. However, filing for bankruptcy may affect a member's eligibility for a security clearance. Service members may consult with the A&FRC as well as the installation legal office for limited assistance with personal bankruptcy.

REFERENCES

UCMJ arts. 123a and 134

Protection Against Discriminatory Treatment, 11 U.S.C. § 525

Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043

DoD 7000.14-R, *Department of Defense Financial Management Regulation*, Volume 7A, *Military Pay Policy – Active Duty and Reserve Pay* (April 2021)

DoDI 1344.09, *Indebtedness of Military Personnel* (8 December 2008)

AFI 36-2906, *Personal Financial Responsibility* (30 July 2018)

DD Form 2654, *Involuntary Allotment Notice and Processing* (December 1999)

CIVILIAN JURY SERVICE BY MILITARY MEMBERS

When a Department of the Air Force member **on active duty** receives a summons to State or local jury duty, the member should inform his or her immediate commander, who will consult with the installation's staff judge advocate (SJA). For the purpose of jury service, "active duty" includes full-time duty in the active military service, full-time training, annual training, active duty for training, and attending a service school while on active military service.

Exemption from Jury Service

- Categorical Exemption: All general officers, commanders, operating forces (forces whose primary missions are participating in and supporting combat), personnel in a training status, and personnel stationed outside the United States are categorically exempt from serving on a State or local jury
- General Exemption (Not Categorical): For all other personnel, the commander determines whether jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command, or activity to which the member is assigned

ANG Command Note

- State Law Disqualification: Many state laws categorically disqualify members in the active service in the armed forces of the United States from jury service. However, many states define active military service of the United States in such a way as to exclude the Air National Guard. Consult your SJA for state-specific applicability.

Procedures

- If the member is categorically exempt, the immediate commander or designee notifies the issuing state or local official by written notice (complying with the format in AFI 51-301, *Civil Litigation*, paragraph 2.8.3.4)
- If the member is generally (but not categorically) exempt, the immediate commander decides whether jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command, or activity to which the member is assigned
 - In determining whether the jury duty would unreasonably interfere with military duties or adversely affect readiness, decision makers may consider, among other factors, the travel time that would be required of a member between his or her duty location and the place where the jury duty would be served, the potential effect such travel time would have on the member's ability to return to productive military duties, and the possible length of time the member would be away from the unit if selected for jury duty
 - If jury duty would not unreasonably interfere with military duties or adversely affect the readiness of a unit, command, or activity, the member must perform jury duty
 - If the immediate commander decides jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command, or activity, the immediate commander requests approval of the exemption from the Special Court Martial Convening Authority (SPCMCA); the SPCMCA may then decide whether:
 - Exemption is inappropriate and instruct the member to comply with the jury summons,
OR
 - Exemption is appropriate, and direct the immediate commander to send a written notice of exemption to the issuing state or local official complying with AFI 51-301, paragraph 2.8.3.4. The SPCMCA's determination is final.

- Written notice of exemption shall state: “(Grade and Name), a member of the United States (Air Force) (Space Force) on active duty, has been summoned to perform jury duty (when, where, and on what jury). Under 10 U.S.C. Sec. 982, DoDI 5525.08, and Air Force Instruction 51-301, this member has been determined by the Secretary of the Air Force or an authorized designee as exempt from duty on the jury in question because such jury service would unreasonably interfere with the performance of the member’s military duties or would adversely affect the readiness of the unit, command, or activity to which the member is assigned. Under 10 U.S.C. Sec. 982(b), this determination is conclusive.”

Fees and Reimbursement

- Time spent by military members on jury duty service should not be charged against them as leave, nor should pay or entitlements be deducted for the period of jury service
- Military members are not entitled to keep any fees for jury service. Those fees should be made payable to the U.S. Treasury and turned in at the local finance office.
- Military members may receive and keep reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty, such as transportation costs or parking fees

REFERENCES

Members: Service on State and Local Juries, 10 U.S.C. § 982

DoDI 5525.08, *Service Member Participation on State and Local Juries* (7 January 2021)

AFI 51-301, *Civil Litigation* (2 October 2018)

HUMAN IMMUNODEFICIENCY VIRUS (HIV)

Medical Background

- Human Immunodeficiency Virus (HIV) is a viral disease involving the breakdown of the body's immune system. The Department of the Air Force tests all members for HIV, medically evaluates all active duty diagnosed members, and educates members on means of prevention. Medical experts believe the nonsexual, person-to-person contact that occurs among co-workers within the workplace does **NOT** pose a risk for transmitting the virus.

HIV and Military Members

- All active duty and Air Reserve Component (ARC) personnel are screened for HIV infection every two years, preferably during their Preventive Health Assessment (PHA). Additionally, ARC personnel must have a current HIV test within two years of the date called to active duty for 30 days or more.
- An active duty member who tests positive for HIV is referred to the HIV Medical Evaluation Unit, located in the Joint Infectious Disease Service of the San Antonio Military Medical Center (SAMMC) at Joint Base San Antonio for medical evaluation and to determine status for continued military service
 - HIV-infected active duty members retained on active duty must be medically evaluated annually and can only be assigned within the continental United States (CONUS), Puerto Rico, Alaska or Hawaii
 - HIV-infected members on flying status must be placed on duty not involving flying (DNIF) status pending medical evaluation or a waiver determination. Waivers are considered using normal procedures established for chronic diseases.

Limitations on Use of Information

- Department of the Air Force policy strictly safeguards results of positive HIV testing as set forth in Attachment 10 of AFI 44-178, *Human Immunodeficiency Virus Program*
 - In accordance with DoDI 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members*, the privacy of a service member with laboratory evidence of HIV infection is protected consistent with the Health Insurance Portability and Accountability Act (HIPAA) and the Privacy Act
 - Very limited release within the Department of the Air Force is permitted on a "need-to-know" basis only (e.g., unit commanders should not inform First Sergeants and/or supervisors unless a determination is made that those individuals truly need to know)
- Laboratory test results confirming HIV infection may not be used as the sole basis for separation of a member or as an independent basis for any adverse administrative or disciplinary action, including punitive action under the Uniform Code of Military Justice (UCMJ)
- Information obtained from a member during, or as a result of, an epidemiological assessment (EA) interview **MAY NOT** be used to support any adverse personnel action against the member

Order to Follow Preventive Medicine Requirements

- After a member is informed that he or she has tested positive, the member's unit commander will be notified expeditiously
- The unit commander will issue an "Order to Follow Preventive Medicine Requirements" to the HIV positive member. For unit assigned reservists, this order is issued only after the member's immediate commander determines the member will be retained in the Selected Reserve.
 - The order should be signed and dated by the commander and member. If the member refuses to sign, the commander should annotate in the acknowledgement section.
 - The order is given in the presence of a credentialed healthcare provider who can answer the member's questions
 - The unit commander is responsible for confidentially safeguarding the order. Upon reassignment, the unit commander forwards the order in a sealed envelope to the gaining commander marked "TO BE OPENED BY ADDRESSEE ONLY" and upon the individual's separation from the Air Force or Space Force, the order is destroyed.
- A service member who knows he or she is HIV positive but violates an order to follow preventive medicine requirements can be punished under the UCMJ for violation of the order, including engaging in the following conduct:
 - Failing to inform sexual partners of HIV status
 - Failing to use proper methods to prevent transfer of bodily fluids during sexual relations
 - Failing to inform emergency health care personnel of HIV status
 - Donating blood, sperm, tissues, or organs

AIDS and Air Force Civilian Employees

- The Department of the Air Force does not test its civilian employees for HIV, except for those civilian employees (appropriated or nonappropriated) selected for assignment overseas who will be screened for HIV infection pursuant to host nation requirements. Civilian employees are also tested for occupational exposures (e.g., civilian medical providers).
- AIDS is a disability under federal civil rights laws, and discrimination on the basis of physical or mental disability is prohibited

REFERENCES

Health Insurance Portability and Accountability Act of 1996, Pub.L. 104-191, 110 Stat. 1936 (21 August 1996)

Privacy Act, 5 U.S.C. § 552a

DoDI 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members* (7 June 2013), incorporating Change 1, 28 April 2020

DoDD 6485.02E, *DoD Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS) Prevention Program (DHAPP) to Support Foreign Militaries* (6 December 2013), incorporating Change 1, 1 June 2018

AFI 44-102, *Medical Care Management* (17 March 2015), certified current, 22 April 2020

AFI 44-178, *Human Immunodeficiency Virus Program* (4 March 2014), certified current 28 June 2016

IMMUNIZATIONS

Military members are required to take certain vaccinations in order to remain mission ready and deployable. Vaccines are administered to personnel on the basis of military occupation, the location of a deployment or duty station, health status, travel plans, and other mission requirements. If a member refuses to take a vaccine, that refusal may result in adverse administrative actions, up to and including involuntary administrative discharge, unless the member has an authorized religious accommodation.

Enforcement

- Commanders are required to ensure military and nonmilitary personnel under their command receive required immunizations and chemoprophylaxis. Orders for military members to comply with vaccine requirements are lawful.
 - If a member indicates he or she will refuse or has refused the vaccine, the member's commander should ascertain/determine why the member is reluctant, provide the member with appropriate education to ensure that the member understands the purpose of the vaccine, and refer the member to the appropriate subject matter expert, as necessary, to discuss any objections and/or concerns (e.g., concerns about vaccine safety should be referred to the supporting medical organization; concerns about the threat should be addressed by intelligence personnel; etc.)
 - If the member is still reluctant to take the vaccine after receiving additional education, send the member to the area defense counsel (ADC) for an explanation of the potential consequences of their refusal
- Medical personnel are not required to administer medical care against a patient's wishes. If a military member refuses to get a vaccine, commanders are limited to administrative enforcement only.
 - Following appropriate counseling, commanders should again order the member to take the vaccine. If the member continues to refuse the vaccine, commanders should consult with the staff judge advocate (SJA) for appropriate action
- Members may seek religious exemptions/accommodations as appropriate. These exemptions must be reviewed by the chaplain, the legal office, and ultimately must be approved by the Department of the Air Force Surgeon General.

REFERENCES

AFI 48-110_IP, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases* (7 October 2013), certified current 16 February 2018

AFMAN 48-105, *Public Health Surveillance* (26 June 2020)

COMMANDER-DIRECTED MENTAL HEALTH EVALUATIONS

Purpose

Commanders or supervisors who have concerns that a member under their command or supervision may be suffering from a mental health problem may direct that member to the mental health clinic for an evaluation (i.e., a Commander-Directed Evaluation or CDE). Commanders and supervisors may make involuntary emergency referrals, formal non-emergency referrals, or informal non-mandatory recommendations for service members to seek care from a mental health provider (MHP).

- DoDI 6490.04, *Mental Health Evaluations of Members of the Military Services*, establishes policy on the uses of, and procedures for, CDEs
- AFI 44-172, *Mental Health*, also provides guidance on mental health issues, including CDEs. It also establishes the Limited Privilege Suicide Prevention (LPSP) Program for Department of the Air Force members facing potential disciplinary action who are assessed to be at risk of suicide and also provides guidance on the psychotherapist-patient privilege under Military Rule of Evidence (M.R.E.) 513 and other rules/policies governing confidentiality of mental health records

Commander/Supervisor Responsibilities

- The responsibility for determining whether or not to refer a service member for a CDE rests with the commander or supervisor. A supervisor is a commissioned officer in or out of a member's official chain of command, or a civilian employee in a grade level comparable to a commissioned officer, who:
 - Exercises supervisory authority over a service member owing to the member's current or temporary duty assignment, **AND** is authorized due to the impracticality of involving an actual commanding officer in the member's chain of command to direct a mental health evaluation
- When possible, mental health providers will assist the commander or supervisor in determining whether or not to direct a CDE
- Emergency CDEs: A commander or supervisor shall refer a member for an emergency CDE as soon as practicable when:
 - The member, by actions or words, such as actual, attempted or threatened violence, intends or is likely to cause serious injury to himself or others;
 - The facts and circumstances indicate the member's intent to cause such injury is likely; or
 - The commander or supervisor believes the member may be suffering from a severe mental disorder
- Commanders ordering emergency CDEs must remember that safety is the first priority and that appropriate precautions should be taken. Commanders will also report to the MHP the circumstances and observations regarding the member that led to the emergency referral either prior to or while the member is en route to the emergency evaluation.
- Non-emergency CDEs
 - Commanders or supervisors may order a non-emergency CDE for a variety of concerns, including fitness for duty, occupational requirements, safety concerns, significant changes in performance or behavioral changes that may be attributable to possible mental status changes

- When the commander or supervisor determines a non-emergency CDE is required, they must advise the member there is no stigma associated with seeking mental health services, refer the member to a mental health provider, with name and contact information, and tell the member the date, time, and place of the scheduled CDE

Involuntary Inpatient Admissions

- Military Medical Treatment Facilities: At bases where the military medical treatment facility (MTF) has a psychiatric inpatient unit, a member will be involuntarily admitted for inpatient evaluation and/or treatment only when a qualified provider determines the member has, or likely has, a severe mental disorder or poses imminent or potential danger to self or others and outpatient treatment is not appropriate
 - The member must be admitted by a psychiatrist, or when a psychiatrist is not available, a physician or other MHP with admitting privileges. A qualified reviewing official (normally a neutral and detached MHP) must review the admission within 72 hours to determine whether continued involuntary hospitalization is clinically appropriate.
 - Members involuntarily admitted for treatment at an MTF are afforded the following rights:
 - In the case of 72 hour review for continued hospitalization, to be notified of the purpose and nature of the review and the right to legal representation during the review by a judge advocate or an attorney of the member's choosing at the member's expense
 - In the case of hospitalization for evaluation or treatment, to contact a friend, relative, chaplain, attorney, any office of Inspector General (IG), or anyone else the member wishes to as soon as the member's condition permits after admission to the hospital
- Civilian Facilities: In the case of referral for an involuntary admission at a base where there is no military inpatient psychiatric unit, the member will be admitted to a civilian facility. MHPs will follow the process established by state law. In a foreign country, applicable host nation laws will be followed.

Command Notification

- In general, healthcare providers are required to follow a presumption that they are not to notify a service member's commander when the service member obtains mental health care or substance abuse education services. However, healthcare providers are required to notify the commander when certain criteria are met, including:
 - Member presents a serious risk of harm to self, others, or to a specific military operational mission
 - Member is in the Personal Reliability Program (PRP) or other pre-identified special program
 - Member is admitted or discharged from inpatient mental health care or substance abuse treatment
 - Member is experiencing an acute mental health condition that impairs their ability to perform assigned duties
 - Member has entered into or is being discharged from a formal outpatient or inpatient substance abuse treatment program
 - Services are obtained as a result of a CDE
- In making a disclosure, healthcare providers are required to release only the minimum amount of information necessary to satisfy the purpose of the disclosure in accordance with the Health Insurance Portability and Accountability Act (HIPAA)

Prohibited Practices

- The commander or supervisor may not refer a member for a CDE as a reprisal for making a protected communication, nor may they restrict the member from lawfully communicating with the member's attorney, the Inspector General (IG), or other authority about the referral. Either act by the commander could constitute a violation of Article 92, Uniform Code of Military Justice (UCMJ), and result in disciplinary action.
- CDEs should not be confused with referrals under AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, DAFI 40-301, *Family Advocacy Program*, or those referrals made pursuant to a ruling from a military judge concerning the administration of a sanity board

REFERENCES

UCMJ art. 92

Military Rule of Evidence 513 (2019)

Rule for Courts-Martial 706 (2019)

DoDI 6490.04, *Mental Health Evaluations of Members of the Military Services* (4 March 2013), incorporating Change 1, 22 April 2020

DoDI 6490.08, *Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members* (17 August 2011)

DAFI 40-301, *Family Advocacy Program* (13 November 2020)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018), incorporating Change 1, 21 November 2019, corrective actions applied, 19 December 2019

AFI 44-172, *Mental Health* (13 November 2015), certified current 23 April 2020

LIMITED PRIVILEGE SUICIDE PREVENTION (LPSP) PROGRAM

Purpose

- Commanders who have concerns that a member under their command who is facing disciplinary action may be at risk of suicide can refer that member to the mental health clinic for a mental health evaluation (MHE). Under limited circumstances, information revealed during such consultations may be afforded enhanced confidentiality under the Limited Privilege Suicide Prevention (LPSP) program. This is in addition to the confidentiality already afforded such communications under the psychotherapist-patient privilege of Military Rule of Evidence (M.R.E.) 513.
 - The objective of the LPSP program is to identify and treat members who, because of the stress of impending action under the Uniform Code of Military Justice (UCMJ), pose a genuine risk of suicide, by providing limited enhanced confidentiality in their communications with a mental health provider (MHP)
 - AFI 44-172, *Mental Health*, is the governing instruction for the program, and provides guidance for commanders who wish to make a referral for a MHE and/or have the member considered for placement in the LPSP program
 - The LPSP program operates in conjunction with the guidance on Commander-Directed MHEs (CDEs) as well as the psychotherapist-patient privilege under Military Rule of Evidence (M.R.E.) 513

Eligibility and Procedures

- Eligible Members: The LPSP program applies to Department of the Air Force members who have been officially notified (written or oral) that they are under investigation or suspected of violating the UCMJ
- Initiation: After official notification, if any individual involved in the processing of the disciplinary action has a good faith belief the member being disciplined may present a risk of suicide, the individual shall communicate that concern to the member's immediate commander along with a recommendation for a MHE and possible placement in the LPSP program
 - Based on the information provided and after consultation with a MHP, the commander may refer the member for a MHE. The procedures and rights associated with MHEs under AFI 44-172 apply to such a referral.
 - The MHP conducting the evaluation determines if the member poses a risk of suicide and, if so, initiates treatment. The MHP explains the LPSP protections to the member, and places the member into the LPSP program.
- Duration: The enhanced protections offered by the LPSP program last only so long as the MHP believes there is a continuing risk of suicide. The MHP must notify the commander when the member no longer poses a risk of suicide. The limited protections offered under the program cease at that time, but further communications remain subject to the psychotherapist-patient privilege under MRE 513. Matters disclosed while the member was in the LPSP program retain the enhanced protections of the LPSP.

Limited Protection

- Members in the LPSP program are granted limited enhanced protection with respect to information revealed in, or generated by, their clinical relationship with MHPs. Any such information may not be used in any existing or future UCMJ action or when weighing the characterization of the member's service in an administrative separation. However, the enhanced protection **does not apply to:**
 - The use of the information as evidence for impeachment or rebuttal purposes in any proceeding in which information generated by and during the LPSP relationship was first introduced by the member concerned
 - Disciplinary or other action based on independently derived evidence
 - Any information gathered by the MHP or other provider prior to placement in the program or after release from the program (except for later created summaries/documents which pertain to treatment under the LPSP program)

REFERENCES

Military Rule of Evidence 513 (2019)

DoDI 6490.04, *Mental Health Evaluations of Members of the Military Services* (4 March 2013), incorporating Change 1, effective 22 April 2020

AFI 44-172, *Mental Health* (13 November 2015), certified current 23 April 2020

DAFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_ DAFGM2021-01, 5 January 2021

AFI 90-5001, *Integrated Resilience* (25 January 2019)

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

The Health Insurance Portability and Accountability Act (HIPAA) generally protects private health information from disclosure, and permits disclosure only under specific circumstances. Such information is typically referred to as protected health information (PHI).

Introduction

- The Department of Defense (DoD) has implemented the HIPAA Privacy Rule through DoDM 6025.18, *Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs*, and the HIPAA Security Rule in DoDI 8580.02, *Security of Individually Identifiable Health Information in DoD Health Care Programs*
- HIPAA's Privacy Rule applies to organizations that meet the definition of "covered entities." Covered entities include, among others, healthcare providers and healthcare facilities, such as medical treatment facilities (MTFs).
 - Commanders (aside from those assigned to the MTF) are generally not considered "covered entities" under HIPAA although medical information they receive from the covered entity remains subject to the Privacy Act
- Improper release of HIPAA-protected information can result in administrative or criminal actions, to include prosecution under the Uniform Code of Military Justice (UCMJ) for military members
 - Certain records that might be considered quasi-medical have been determined by the DoD to not be subject to HIPAA. For example, the DoD drug testing program is not subject to HIPAA. DoDM 6025.18, paragraph 1.1.b. contains a comprehensive list of health-related records and activities in the DoD to which HIPAA does not apply.

Permissible Disclosures

- Under HIPAA, even without the individual's authorization, an MTF may still disclose PHI for certain purposes, the most relevant of which are summarized below. (Note that most of these purposes have additional specific requirements that must be met prior to disclosure of PHI, as outlined in Section 4.4. of DoDM 6025.18).
 - As required by law (includes requirements in DoD and Defense Health Agency publications, as well as Department of the Air Force service level regulations and instructions to the extent consistent with DoDM 6025.18)
 - For public health activities
 - To avert serious threats to health or safety
 - For "specialized governmental functions." This provision allows certain disclosures of the PHI of Armed Forces personnel for "activities deemed necessary" by appropriate military command authorities to assure the proper execution of the military mission. See further discussion below.
 - For judicial and administrative proceedings
 - For law enforcement purposes (which includes the Air Force Office of Special Investigations (AFOSI), Security Forces (SF), and judge advocates when acting as prosecutors)
 - For issues related to victims of abuse, neglect, or domestic violence
 - For issues related to inmates in correctional institutions or in custody
 - For health oversight activities

- Accounting of Disclosures: Most of these disclosures are accountable, which means the MTF must document who received the information, when, and for what purpose, and provide the information upon the patient's request
- Minimum Necessary Rule: When HIPAA allows a use or disclosure of protected health information, with few exceptions, MTFs are required to provide only the minimum amount of information necessary to satisfy the intended purpose of the disclosure (similar to the "need to know" requirement for classified information)

Commanders' Access to Information

- Under the "specialized government functions" provision described above, commanders can access PHI of Armed Forces personnel (not including dependents or civilian employees) for activities deemed necessary to assure the proper execution of the military mission. This rule generally permits disclosures for fitness for duty purposes.
 - For example, commanders may need PHI related to readiness (vaccination status, profile status, etc.). Commanders may also require information related to medical conditions impacting members' abilities to perform their duties (profile information, etc.). Commanders may even need PHI to verify the whereabouts of subordinates.
- However, under the "minimum necessary" rule stated above, any release of PHI must be limited in scope to what the commander actually needs to accomplish his or her mission
 - For example, if a member has a foot injury that precludes prolonged standing, the MTF may disclose PHI to the commander related to the foot injury because it impacts the type of day-to-day duties that the member can be assigned (i.e., it impacts mission accomplishment). The MTF would not disclose the member's dental records, mammograms, or other medical information unrelated to the foot injury, though, because that PHI would exceed the minimum necessary.
- There is no "blanket rule" concerning disclosure of PHI to commanders. In each case, the nature and extent of PHI disclosed must be determined by evaluating the commander's need and applying the minimum necessary rule.
- Only commanders and their designees can access PHI under these rules. AFI 41-200, *Health Insurance Portability and Accountability Act (HIPAA)*, provides that a commander's designee includes deputy/vice commander and first sergeant. If the commander wishes to designate any other individual as an authorized recipient of PHI, the commander must do so in writing.
- A commander's access to information may be further limited by other law or DoD policy, such as confidentiality for sexual assault victims, DoD policies on reducing the stigma of mental health treatment, or other applicable policy

REFERENCES

- DoDM 6025.18, *Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs* (13 March 2019)
- DoDI 6025.18, *Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule Compliance in DoD Health Care Programs* (13 March 2019)
- DoDI 8580.02, *Security of Individually Identifiable Health Information in DoD Health Care Programs* (12 August 2015)
- AFI 41-200, *Health Insurance Portability and Accountability Act (HIPAA)* (25 July 2017), certified current 10 April 2020
- AFMAN 41-210, *Tricare Operations and Patient Administration* (10 September 2019)
- DD Form 2870, *Authorization for Disclosure of Medical or Dental Information* (December 2003)

PERSONNEL RELIABILITY PROGRAM (PRP)

The Personnel Reliability Program (PRP) is designed to ensure only those persons who demonstrate reliability will be certified to perform specified duties associated with U.S. nuclear weapons systems, nuclear command and control (NC2) systems, material, equipment, and special nuclear material (SNM). PRP is a critical link in nuclear surety by determining the fitness for duty of individuals subject to PRP.

Responsibilities

- Wing commanders are responsible for the wing PRP. They serve as the reviewing official for all permanent decertification case files started by subordinate units. They also ensure base PRP meetings are conducted quarterly at the wing level.
- Group and unit commanders who control or have access to nuclear weapons, weapon systems, or critical components, and perform the actual PRP certification are certifying officials (COs) who certify and initiate decertification for their personnel. They may delegate this duty to a deputy or assistant. Certifying officials and their delegates must be certified in a PRP category equal to, or higher than, the personnel they are certifying.
- Individuals in the PRP are subject to continuous evaluation of their reliability and are responsible for complying with the intent of PRP at all times, even while away from their duty station (e.g., leave, TDY, etc.). Responsibility for ensuring continuous eligibility rests with each individual involved with PRP. Individuals in the PRP must monitor their own reliability. They must also notify the CO immediately of any potentially disqualifying information (PDI), either their own or that of co-workers.

Categories of PRP Positions

- Critical Position: Initial certification for critical positions must have Top Secret eligibility, completed within the last five years, and favorably adjudicated. These positions generally involve individuals assigned nuclear duties where they have access and technical knowledge, or can either directly or indirectly cause the launch or use of a nuclear weapon.
- Controlled Position: Initial certification for a controlled position must have Secret eligibility or a higher investigation that was completed within the last five years and favorably adjudicated. These positions generally involve individuals assigned nuclear duties who have access but no technical knowledge, control access into areas containing nuclear weapons but do not have access or technical knowledge, or are armed and assigned duties to protect or guard nuclear weapons.

PRP Certification Requirements

- Individuals selected and certified for the PRP must meet the following minimum criteria at all times:
 - Dependable, mentally alert, and technically proficient commensurate with their respective duty requirements
 - Flexible in adjusting to changes in the working environment, including the ability to work in adverse emergency situations
 - Good social adjustment, emotional stability, personal integrity, sound judgment, and allegiance to the United States
- Have a positive attitude towards nuclear weapons duty
 - Medical evaluation by health professionals specifically trained for PRP patients
 - PRP certification requires an in-depth review of a members personnel file

- Every candidate is personally interviewed by the CO
- Every candidate must demonstrate potential for technical proficiency commensurate with nuclear weapon position requirements

Potential Disqualifying Information (PDI)

- Any of the following traits or conduct is PDI:
 - Personal conduct involving questionable judgment
 - Emotional, mental, and personality disorders
 - Negative financial habits or circumstances
 - Criminal conduct
 - Substance or drug misuse and drug incidents
 - Alcohol Abuse Disorder and alcohol-related incidents
 - Sexual harassment or assault
 - Security violations
 - Misuse of information technology systems

Certifications

- Formal: Validates an individual has been screened, evaluated, and meets the standards for assignment to PRP duties
- Interim: Limits access when an individual is placed in PRP and does not currently possess the required security investigation for formal certification but does have a security investigation adequate for interim clearance
- Administrative: Granted when an individual does not currently hold a formal or interim certificate for PRP duties and is identified for an assignment to a PRP position

Removal from PRP

- Members may be removed from PRP duties through suspension or decertification
- Suspension:
 - Suspension is used to immediately remove an individual from PRP related duties, initially up to three months, without starting decertification action. The CO may extend the suspension to one year, in three month increments.
 - After one year, if the reasons or conditions for suspension still exist and impact reliability, the individual will be decertified
 - The CO makes the final decision and can return an individual to PRP duties at any point during the suspension timeframe
 - A CO who is suspended may perform PRP administrative functions
- Mandatory Decertification or Disqualification:
 - Any of the following conditions will result in decertification or disqualification for a PRP position:
 - The individual is diagnosed as alcohol-dependent and subsequently fails required after-care program or fails to participate in the prescribed rehabilitation program or treatment

- The individual is involved in trafficking, cultivation, processing, manufacture, or sale of any controlled drug
- The individual has ever used a drug that could cause flashbacks
- The individual is diagnosed with a severe substance use disorder
- Loss of confidence by the certifying official in the reliability of the individual
- The individual's security clearance eligibility has been revoked
- Within 15 workdays of the decertification, the CO will advise the individual, in writing, of the reasons for decertification and of the requirement for review by the reviewing official
- A decertification or disqualification may be reinstated provided there is documented evidence that clearly demonstrates the disqualifying reason no longer exists and the individual concerned is otherwise qualified

REFERENCES

- DoD Manual 5210.42, *Nuclear Weapons Personnel Reliability Program* (13 January 2015), incorporating through Change 3, 31 August 2018
- DoDM 5210.42_AFMAN 13-501, *Nuclear Weapons Personnel Reliability Program (PRP)* (19 September 2018), including DoDM5210.42_AFMAN13-501_AFGM2020-01, 14 April 2020
- AFI 31-117, *Arming and Use of Force by Air Force Personnel* (6 August 2020)
- AFI 91-101, *Air Force Nuclear Weapons Surety Program* (26 March 2020)

LAUTENBERG AMENDMENT

The 1996 Domestic Violence Amendment to the Gun Control Act (referred to as the Lautenberg Amendment) makes it a federal offense for anyone convicted of a misdemeanor crime of domestic violence to ship, transport, possess, or receive firearms or ammunition. This amendment added to the Gun Control Act's prohibition which makes it illegal for anyone convicted of a felony from buying or possessing a firearm. The Department of Defense (DoD) policy for implementing this law to military personnel and DoD civilian personnel is found in DoDI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel*.

Definition of Crime of Domestic Violence

- An offense is defined as domestic violence if it has, as an element, the use or attempted use of physical force, or threatened use of a deadly weapon committed by:
 - A current or former spouse of the victim
 - A parent or guardian of the victim
 - Someone who has a child in common with the victim
 - Someone who is cohabitating with the victim or who has cohabitated with the victim as a spouse, parent, or guardian
 - Someone similarly situated to a spouse, parent, or guardian of the victim (i.e., a girlfriend/boyfriend relationship)
- The title of the crime does not have to be “domestic violence” if the underlying facts fit within the DoD definition
- A crime may constitute domestic violence even if it is not charged under Article 128b of the Uniform Code of Military Justice (UCMJ)
- Not all offenses charged as an offense of domestic violence under Article 128b, UCMJ, will qualify under the definition of domestic violence adopted in 18 USC § 922. Likewise, some domestic violence offenses may be charged as violations of Article 120, 120b, 128, etc., UCMJ.

Qualifying Convictions

- Any state or federal conviction (including convictions under the UCMJ via general or special court-martial) for a misdemeanor crime of domestic violence, or an action qualifying as a conviction, prohibits the possession of a firearm under the Lautenberg Amendment
- Charges that are reduced or negotiated to a crime not entitled “domestic violence” may still qualify, if the factual basis fits within the DoD definition
- To qualify as a “conviction”, the person convicted must have been represented by an attorney or affirmatively waived such right. The installation's legal office and staff judge advocate (SJA) will assist commanders in determining if there is a qualifying conviction.
- The following **DO NOT** qualify as a conviction:
 - Convictions that are expunged or set aside
 - Convictions that are pardoned
 - Summary court-martial convictions
 - Non-judicial punishment (NJP)
 - Deferred prosecutions or similar alternate dispositions in civilian courts

- The DoD does not construe the Lautenberg Amendment to apply to major military weapons systems, or “crew served” weapons and ammunition (e.g., aircraft, tanks, missiles)

Department of the Air Force Implementation

- Commanders take appropriate measures to ensure government-owned firearms or ammunition are not issued to anyone they have cause to believe has a qualifying conviction
- Commanders are responsible for ensuring all military members are briefed periodically on the Gun Control Act, Lautenberg Amendment, and its consequences
- Air Force and Space Force members must complete a DD Form 2760, *Qualification to Possess Firearms or Ammunition*:
 - Annually for all personnel who work with or are required to qualify on government-issued firearm, destructive device, or ammunition (Arming Group A)
 - For all other personnel, upon deployment preparation and/or training time prior to deployment or upon permanent change of station (PCS), permanent change of duty assignment (PCA), or temporary duty or responsibilities requiring use of or access to a government-issued firearm, destructive device, or ammunition (Arming Group B)
- Notices regarding the Lautenberg Amendment must be posted at all facilities where government firearms are stored, issued, disposed of, or transported
- Upon discovery of a qualifying conviction, commanders will:
 - Immediately retrieve and deny further access to any government-issued firearms, destructive device, or ammunition, including those available from Morale, Welfare, and Recreation (MWR) facilities (e.g., skeet/trap)
 - Consult the servicing legal office for guidance on final release and/or disposition of privately owned weapons/ammunition stored in government armory
- Members who possess a qualifying conviction are ineligible for all weapons training. They may be subject to discharge for the underlying act of domestic violence, the underlying conviction, or the loss of their Air Force Specialty Code (AFSC), but not simply because he or she is unable to possess a firearm. Further, they may be cross-flowed or retrained into an AFSC not requiring firearms.

Criminal Data Submission and Indexing Requirements

- For domestic violence investigations or qualifying convictions, the Military Criminal Investigative Organization (MCIO) and other DoD law enforcement agents have very specific criminal history reporting requirements. This may include the collection and submission of fingerprints and DNA samples. The Department of the Air Force Criminal Justice Information Cell (DAF-CJIC) is responsible for Air Force and Space Force criminal indexing.
- Commanders, depending on the type of investigation (including commander-directed investigations), have a responsibility to ensure appropriate samples are taken from an accused member. Commanders should consult their servicing law enforcement and legal office for guidance on criminal data submission requirements.
- Servicing legal offices will provide disposition documentation to appropriate personnel/offices to include DAF-CJIC within five duty days of completion of the documents. Documents to be provided include, but are not limited to, statement of trial results (STRs), entry of judgment (EOJ), NJPs, sexual assault initial dispositions other than court-martial, and administrative action (to include administrative discharges).

REFERENCES

Gun Control Act of 1968, 18 U.S.C. §§ 921 *et seq.*

DoDI 5505.11, *Fingerprint Reporting Requirements* (31 October 2019)

DoDI 5505.14, *Deoxyribonucleic Acid (DNA) Collection Requirements for Criminal Investigations, Law Enforcement, Corrections, and Commanders* (22 December 2015), incorporating Change 1, 9 March 2017

DoDI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (21 August 2007), incorporating through Change 4, 26 May 2017

DD Form 2760, *Qualification to Possess Firearms or Ammunition* (December 2002) AFI 31-117, *Arming and Use of Force by Air Force Personnel* (6 August 2020)

DAFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_DAFGM2021-01, 5 January 2021

AFMAN 71-102, *Air Force Criminal Indexing* (21 July 2020)

CONSCIENTIOUS OBJECTION (CO) TO MILITARY SERVICE

Although military service is an obligation of citizenship (i.e., via draft), Congress recognized early that certain individuals and groups hold convictions against the use of force in any form.

General Policies

- A conscientious objector (CO) is a person who is opposed to participation in war *in any form*, or the bearing of arms, based on a firm, fixed, and sincere belief as a result of religious training or similar belief system. Moral or ethical beliefs, even if not characterized by the holder as “religious,” may provide sufficient grounds for CO status.
- The objection to war must be all-inclusive, not to specific wars or conflicts
- COs are classified as either Class 1-0 (a person who sincerely objects to participation in war in any form), or as Class 1-A-0 (a person who sincerely objects to participation as a combatant in war in any form, but whose convictions will permit him or her to serve in noncombatant status)
- Administrative discharge by the Secretary of the Air Force (SecAF) prior to completion of term of service is discretionary based on the facts of each case
- Applicants for CO status who are awaiting disposition of their case should be assigned to duties that conflict as little as possible with their beliefs. Applicants must comply with the normal requirements of military service and perform duties they are assigned to include active duty or transfer orders in effect at the time of the application or subsequently issued.

Application Procedures

- Applicants have the burden of proof to show they meet CO status, and must establish, by clear and convincing evidence:
 - They oppose participation in war in any form or the bearing of arms;
 - Their belief is honest, sincere, and deeply held;
 - Their belief is by virtue of religious training or other belief system akin to religion; and
 - The nature or basis of their claim falls under the definition of conscientious objection in AFI 36-3204, *Procedures for Applying as a Conscientious Objector*, Attachment 1
- The applicant submits the application to the servicing Military Personnel Section (MPS)/Career Development Element, or to the immediate commander if the applicant is in the Air Force Reserve (AFR) or Air National Guard (ANG) and is not serving on extended active duty (EAD). See AFI 36-3204, Attachment 2, for information that should be included.
- The MPS notifies the unit commander, reviews the personnel records of the applicant for pertinent information, and counsels the member about the effect of a CO determination on Veteran's Administration (VA) entitlements. MPS also schedules a chaplain and psychiatrist interview.
 - A chaplain personally interviews the applicant to determine sincerity and depth of conviction against war, and must submit a written report detailing conclusions, but does not make any recommendation concerning the application
 - An appropriately credentialed mental health professional interviews the applicant to determine the presence of any mental disorder warranting medical or administrative disposition. Again, no recommendation on the application is made.

- For active duty and AFR non-EAD members, the Special Court-Martial Convening Authority (SPCMA) appoints a judge advocate as an Investigating Officer (IO) to interview the applicant under oath, assemble all the relevant material, and interview other witnesses. For ANG non-EAD members, the wing or group commander exercising control over the servicing ANG/MPS appoints the IO. Duties for the IO are set forth in AFI 36-3204.
- Guidelines for approving or disapproving applications are found in Chapter 5 of AFI 36-3204. Generally, the reviewing authorities must find:
 - For conscientious objection (1-O) classification, the applicant's moral and ethical beliefs oppose participation in war in any form and that the applicant holds these beliefs with the strength of traditional religious convictions;
 - For assignment to noncombatant training and service based on conscientious objection (1-A-O), an applicant's moral and ethical beliefs objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a non-combatant status;
 - Conscientious objection must be the primary controlling factor in the applicant's life; **and**
 - A primary factor is the sincerity with which the applicant holds this belief. In evaluating applications, carefully examine and weigh the conduct of applicants, in particular, their outward manifestation of their beliefs along with the applicant's thinking and lifestyle in its totality, past and present.
- The commander who appoints the IO makes a recommendation before forwarding the file up the chain of command. The Secretary of the Air Force Personnel Council (SAFPC) makes the decision regarding CO status for officer applicants. For enlisted personnel, the final decision authority is:
 - The Air Force Personnel Center (AFPC) for active duty enlisted Airmen and Guardians
 - The Director of the Air National Guard (NGB/CF) for ANG Airmen
 - The Deputy Commander of the Air Force Reserve Command (AFRC/CV) for Category A Traditional Reservists
 - The Air Reserve Personnel Center (ARPC) for Individual Reservists (IR) – Individual Mobilization Augmentees (IMAs) and Participating Individual Ready Reservists (PIRRs)
 - SAFPC is the disapproval authority for all enlisted members
- Members determined to be COs (1-O or 1-A-O where further service is not desired by the Air Force or Space Force) will be processed for administrative discharge according to the applicable Department of the Air Force instruction, for convenience of the government as the basis for separation

REFERENCES

DoDI 1300.06, *Conscientious Objectors* (12 July 2017)

AFI 36-3204, *Procedures for Applying as a Conscientious Objector* (6 April 2017)

PHYSICAL FITNESS PROGRAM AND PHYSICAL FITNESS ASSESSMENTS

The goal of the Department of the Air Force Physical Fitness Program is to motivate all members to participate in a year-round physical conditioning program that emphasizes total fitness, to include proper aerobic conditioning, muscular fitness training, and healthy eating. An active lifestyle will increase productivity, optimize health, and decrease absenteeism while maintaining a higher level of readiness. Commanders and supervisors must incorporate fitness into the Air Force and Space Force culture by establishing an environment for members to maintain physical fitness and health to meet expeditionary mission requirements. The Physical Fitness Assessment (PFA) provides commanders with a tool to assist in the determination of overall fitness of their military personnel. Commander-driven physical fitness training is the backbone of the Department of the Air Force Fitness Program and an integral part of mission requirements. The program promotes the primary physical fitness components of cardiorespiratory endurance (aerobic), body composition, muscular strength, muscular endurance, and flexibility of each Airman and Guardian in the unit. For now, Guardians will adhere to the Department of the Air Force fitness program. Eventually, however, the U.S. Space Force will develop its own physical fitness program and PFA.

Unit/Squadron Commander's Duties

- The unit/squadron commander's duties are outlined AFMAN 36-2905, *Air Force Physical Fitness Program*, and include, but are not limited to, the following:
 - Establishing an environment that supports, encourages, and motivates a healthy lifestyle through optimal physical fitness and nutrition and ensures compliance with AFMAN 36-2905
 - Establishing and enforcing the unit's physical fitness program and ensuring appropriate administrative action is taken in cases of non-compliance
 - Appoint, in writing, individuals to conduct PFAs in support of the Fitness Assessment Cell (FAC), appoint Physical Training Leaders (PTLs) if unit physical training (PT) is implemented, and appoint a Unit Fitness Program Manager (UFPM)
 - The Air Reserve Component (ARC) Commander must promote and support unit physical fitness programs as mission requirements and resources allow. Additionally, they must appoint the installation's Fitness Information Manager (FIM) and FAC Manager. The FIM should be a noncommissioned officer or senior noncommissioned officer of any Air Force Specialty Code (AFSC) appointed by the installation commander, ARC wing commander, or equivalent.

Physical Fitness Standards

- Members will receive a composite score of 0 to 100 based on component scores for aerobic fitness (60 points max), body composition (20 points max), push-ups (10 points max), and sit-ups (10 points max). Effective December 2020, the Department of the Air Force permanently removed the waist measurement from the PFA.
- The following fitness levels are determined by a member's composite score:
 - Excellent: All component minimums met and member scores at/above 90. Airmen and Guardians in this category will test at least annually (12 months from prior excellent score). Airmen and Guardians must have earned an excellent by completing all PFA components or be on a medical profile and declared medically incapable of performing one or more components of the PFA and achieve a composite score of 90 or above on the remaining components in order to test on a 12-month currency cycle.

- Satisfactory: All component minimums met and member scores 75 to 89.99
 - Regular Air Force (RegAF), Air Force Reserve (AFR), and Air National Guard (ANG) members on Title 10 Statutory Tour and Title 32 Active Guard/Reserve (AGR) who obtain a satisfactory score on a PFA shall test every six months (twice a year)
 - ANG Title 32 Drill Status Guardsmen (DSGs) must complete an official PFA at least annually and must be tested by the last day of the 12th month following the previous satisfactory test
- Unsatisfactory: One or more component minimum not met and/or member scores less than 75 total points
 - RegAF, AFR, and ANG (Title 10 Statutory Tour or Title 32 AGR) Airmen and Guardians who fail to attain a passing PFA score must retest within 90 days (180 calendar days for Title 32 DSGs)
 - Although members may voluntarily retest before the end of the 90-day reconditioning period (180 calendar days for Title 32 DSGs), retesting is not recommended for a minimum of 42 calendar days (90 calendar days for ANG Title 32 Drill Status Guardsmen) to allow sufficient time for reconditioning
 - Members wishing to test earlier than the 42 calendar days (90 calendar days for ANG Title 32 DSGs) must obtain their commander's approval
- Commanders may grant exemptions from the various components of the PFA in accordance with AFMAN 36-2905, Table 4.1. Airmen and Guardians with exemptions prohibiting them from performing one or more components of the PFA will be assessed on the remaining components.
- Airmen and Guardians with pregnancies lasting 20 weeks or more are exempt from PFA for 12 months after discharge from the hospital upon completion of pregnancy (delivery, miscarriage, etc.). The Airman or Guardian must test by the last day of the 12th month. Pregnancy-related exemptions apply to the PFA and do not exempt the Airman or Guardian from participating in an approved physical fitness program.

Fitness Improvement Program (FIP)

- The FIP targets nutritional and exercise behavior changes necessary to improve an Airman or Guardian's health and fitness utilizing various intervention options
- FIP is mandatory for all Airmen and Guardians with an unsatisfactory PFA score and is available for any Airman or Guardian who wishes to improve their overall health and fitness. Airmen, Guardians, and their commanders select an option (BE WELL online and Military OneSource Health Coaching) appropriate to their fitness improvement needs and/or desires.
- RegAF, Title 10 Statutory Tour, Title 32 AGR, and AFR/AGR Airmen and Guardians must start the FIP within 10 duty days of their unsatisfactory PFA. Title 32 DSGs and Traditional AFR personnel are required to accomplish FIP within 60 calendar days of the unsatisfactory PFA.
- Airmen and Guardians who receive consecutive unsatisfactory PFAs are required to reenroll in the FIP. Additionally, Airmen and Guardians who receive nonconsecutive unsatisfactory PFAs must start the FIP within 10 duty days of their latest unsatisfactory PFA and 60 calendar days for ARC Airmen.
- Airmen and Guardians are ultimately responsible for improving their fitness level to achieve a minimum satisfactory PFA score, and, if appropriate, provide documentation of compliance with FIP to their leadership

Diagnostic Fitness Assessments

- Diagnostic PFA: A non-attribution assessment aimed to provide feedback and help Airmen and Guardians identify and improve any problem areas. Diagnostic PFAs will follow the same standards and procedures for an official PFA. In other words, a diagnostic PFA is an unofficial physical PFA conducted under official conditions.
- Airmen and Guardians with a current PFA on file (regardless of score or exemption status on last PFA) and not presently exempt may voluntarily complete a diagnostic PFA no later than 15 calendar days prior to the expiration of their current PFA. Airmen and Guardians who are not current are not eligible to take a diagnostic PFA.
- Airmen and Guardians may attempt at least one but no more than three diagnostic PFAs per calendar year. Commanders must allow Airmen and Guardians the opportunity to take at least one voluntary diagnostic PFA each year.
- Airmen and Guardians will be notified of their overall score after completing the diagnostic PFA
 - If the result is a passing score (satisfactory or excellent), the Airman or Guardian must decide whether to make the diagnostic PFA official by initialing next to their total score and fitness category section, prior to leaving the testing location
 - Only after an Airman or Guardian elects to count the diagnostic PFA will the results be recorded in Air Force Fitness Management System II (AFFMS)
 - Airmen and Guardians may not be directed to make a diagnostic PFA official

Administrative and Personnel Actions

- Members are expected to comply with Department of the Air Force fitness standards at all times. When members fail to comply with those standards (receive an unsatisfactory PFA score), they potentially render themselves to adverse action. Commanders should consult with their servicing staff judge advocate (SJA) before taking such action.
- Prohibited Actions:
 - Commanders may not impose nonjudicial punishment solely for failing to achieve a satisfactory fitness score
 - While units may perform unofficial practice tests for diagnostic purposes, commanders will refrain from taking adverse action based solely on the results of these tests
 - A member is not subject to adverse personnel action for inability to take the PFA if the member is on a 365-day PFA exemption that has been validated by the military treatment facility (MTF)
- Authorized Actions: AFI 36-2905, Attachment 7, contains guidance on mandatory and optional administrative and personnel actions for members failing to meet fitness standards on one or more PFAs, with options covering the full range of administrative tools for progressive discipline. Selected guidance includes:
 - Unit commanders will consider adverse administrative action upon a member's unsatisfactory fitness score on an official PFA. If adverse administrative action is not taken in response to an unsatisfactory fitness score on an official PFA, unit commanders will document in the member's fitness case file as to why no action is being taken. The lack of such commander documentation does not discount the testing failure as a basis in support of administrative discharge action.

- As appropriate, unit commanders will document and take corrective action for a member's unexcused failure(s) to participate in the fitness program such as failing to accomplish a scheduled PFA, failing to attend a scheduled fitness appointment, failing to complete mandatory educational intervention, or failing to maintain the required documentation of exercise while on the fitness improvement program
- Enlisted Airmen and Guardians failing to have a current/passing PFA score at the Promotion Eligibility Cut-Off Date (PECD) are ineligible for promotion. Likewise, commanders should consider delaying the promotion of officers who fail to have a current/passing PFA at his or her projected date of promotion.
- It is within a commander's discretion to document within an Enlisted Performance Report (EPR) or Officer Performance Report (OPR) a referral for a non-current/failing PFA at the evaluation close-out date, or EPR Static Close-Out Date (SCOD)
- Unit commanders **MUST** make a discharge or retention recommendation to the separation authority (enlisted Airmen/Guardians), show cause authority (officers), or appropriate discharge authority for Air Force Reserve (AFR) and Air National Guard (ANG) members when an individual remains in the Unsatisfactory fitness category for a continuous 12-month period or receives four unsatisfactory PFA scores in a 24-month period. However, prior to initiation of discharge action, a military medical provider must rule out medical conditions precluding the member from achieving a passing score.

REFERENCE

AFMAN 36-2905, *Air Force Physical Fitness Program* (11 December 2020)

UNAUTHORIZED ABSENCE

Most forms of unauthorized absence, from simply being late for work (failure to go) to an extended absence without leave, are punishable under Article 86, Uniform Code of Military Justice (UCMJ). Airmen and Guardians who intend to abandon their military duties permanently are deserters and are subject to prosecution under Article 85, UCMJ. Aside from disciplinary actions, there are certain requirements and considerations a unit must satisfy when handling cases involving an unauthorized absence.

- When an unauthorized absence is discovered, it is important to note the date and time
 - *Failure To Go*: An absence of less than 24 hours is classified as a “failure to go” for administrative purposes
 - *Absence Without Leave*: When the member’s absence continues longer than 24 hours and less than 30 days, the member’s unit must change the member’s administrative status to “absence without leave” (AWOL)
 - *Deserter*: If a member has been absent for more than 30 consecutive days, the member’s unit must change the member’s administrative status to “deserter”
 - Taking these administrative steps **WILL NOT**, standing alone, prove that the member has committed an unauthorized absence in violation of any UCMJ article
 - The administrative steps will affect pay and allowances and put the service member’s name in a database to support apprehension efforts of military and civilian law enforcement authorities
 - *Duty Status Whereabouts Unknown*: Regardless of the reason for the absence, if the commander’s initial investigation reveals any indication that the absence results from an involuntary casualty rather than desertion or unauthorized absence, a status of Duty Status-Whereabouts Unknown (DUSTWUN) may be appropriate. Consult DAFI 36-3002, *Casualty Services*, the Military Personnel Flight (MPF), and the servicing staff judge advocate (SJA) for advice in such cases.

Commander Responsibilities:

- Under AFI 36-3802, *Force Support Readiness Programs*, Chapter 8, if the member reasonably appears to be absent without authority, the commander on G-series order must undertake the following actions:
 - Immediate Actions:
 - Contact the MPF and inform them of the member’s status
 - Consult with the servicing SJA to determine whether the member’s status should be changed to ‘deserter’
 - Criteria include duty or travel restrictions, access to top secret or other qualifying classified documents, request for asylum or residence in a foreign country, uncompleted action for a previous AWOL, escaped prisoner, under investigation for UCMJ violation or awaiting trial at a general court-martial, believed likely to commit violent acts or harm themselves/others, or evidence of intent to remain away permanently
 - Evaluate the case to determine whether the casualty services provisions of DAFI 36-3002 applies
 - Notify Security Forces Squadron (SFS) if necessary

- After 24 Hours of Absence: Prepare an AF Form 2098, *Duty Status Change*, changing the absentee's status to either AWOL or deserter as appropriate, and forward it to the MPF, with a copy to the local Finance Office. Consult the servicing SJA.
- On the 3rd Day of Absence: Prepare and forward a 72-hour inquiry to SFS and MPF and re-evaluate whether DAFI 36-3002 applies
 - If the member is administratively classified as a deserter, the commander prepares, signs, and distributes the DD Form 553, *Deserter/Absentee Wanted by the Armed Forces*, and changes the member's duty status within 24 hours of the decision to place the member in deserter status
- On the 10th Day of Absence: Prepare and forward letters to the next of kin and allotment payees, and provide copies of these letters to MPF
- On the 31st Day of Absence:
 - Ensure processing of DD Form 553 (MPF will assist in preparation) and decide (with the assistance of SFS and MPF) to whom DD Form 553 should be sent
 - Initiate AF Form 2098 changing status from AWOL to deserter
 - Notify MPF of the member's continued absence and retrieve dependent ID cards as required by AFI 36-3026V1_IP, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel*, Table 8.3, when member is placed in deserter status. Dependents lose medical benefits and shopping privileges in accordance with AFI 36-3026V1_IP, Table 9.2.
 - Consult with SJA about filing court-martial charges
 - Prepare 31st day status report
- On the 60th Day of Absence: Notify SFS and MPF of the member's continued absence, obtain updated input from SFS and prepare and forward the 60-day status report
- On the 180th Day of Absence: Military Personnel Data Systems (MilPDS) program automatically drops absentee from the unit rolls. Commander notifies SFS of status change and consults with SJA concerning other options and/or requirements.
- Military law enforcement personnel and commissioned, warrant, petty, and non-commissioned officers may apprehend absentees and deserters. Civil officers authorized to arrest offenders under federal and state laws may arrest a deserter and deliver the offender into the custody of the Armed Forces. These civil officers may also arrest absentees at the request of military and federal authorities.
- United States authorities may apprehend absentees and deserters in foreign countries only when an international agreement with the country authorizes it or under an agreement with proper local authorities that does not violate an existing international agreement. Always consult the SJA in these cases.

REFERENCES

DAFI 36-3002, *Casualty Services* (4 February 2021)

AFI 36-3026_IP Volume 1, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (4 August 2017)

AFI 36-3802, *Force Support Readiness Programs* (9 January 2019)

AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_DAFGM2021-01, 5 January 2021

DD Form 553, *Deserter/Absentee Wanted by the Armed Forces* (March 2015)

AF Form 2098, *Duty Status Change* (30 June 2003)

LINE OF DUTY (LOD) DETERMINATIONS

A Line of Duty (LOD) determination is a finding made after an investigation into the circumstances of a member's injury, illness, disease, or death. The finding determines: (1) whether or not the illness, injury or disease existed prior to service (EPTS) and if so, whether an EPTS condition was aggravated by military service; (2) whether or not the illness, injury, disease or death occurred while the member was absent without authority; and (3) whether or not the illness, injury, disease or death was due to the member's misconduct. On the basis of the LOD determination, the member or their next of kin may be entitled to benefits administered by the Department of the Air Force, or exposed to liabilities.

Use of the LOD Determination

- An LOD determination may impact the following:
 - Disability, retirement, and severance pay
 - Forfeiture of pay
 - Extension of enlistment
 - Veteran benefits
 - Survivor Benefit Plan
 - Basic Educational Assistance Death Benefit
 - Medical benefits and incapacitation pay for members of the Air Reserve Component (ARC)

Limits on Use of an LOD Determination

- An LOD determination shall not be used as a basis for disciplinary actions
- An active duty member cannot be denied medical treatment based on an LOD determination. Further, an LOD determination does not authorize recoupment of the cost of medical care from the member.

When an LOD Determination is Required

- An LOD determination must be initiated, whether the member is hospitalized or not, when the following occurs:
 - Death of a member: An AF Form 348, *Line of Duty Determination*, must be completed in every case involving the death of a member in any duty status, to include travel to and from a duty station
 - A Regular Air Force (RegAF) member is unable to perform military duties for more than 24 hours due to an injury
 - An injury involving likelihood of a permanent disability
 - An injury or disease involving the abuse of alcohol or other drugs
 - A self-inflicted injury
 - An injury or disease possibly incurred during a period of unauthorized absence
 - An injury or disease possibly incurred during a course of conduct for which charges have been preferred under the Uniform Code of Military Justice (UCMJ)

- For members of the Air Reserve Component (ARC), which includes the Air Force Reserve (AFR) and Air National Guard (ANG), in addition to the situations listed above, an LOD determination must be made when:
 - The member incurs or aggravates an illness, injury or disease, or receives any medical treatment while serving in any duty status, regardless of the member's ability to perform military duties
 - The member dies, or incurs, or aggravates an illness, injury or disease while traveling directly to or from the place at which duty is performed
 - The member dies, or incurs, or aggravates an illness, injury or disease while remaining overnight immediately before or between successive periods of inactive duty training (IDT), at or in the vicinity of the site of the IDT, if the site is outside reasonable commuting distance from the member's residence

Possible LOD Determinations

- In Line of Duty (ILOD): A determination of ILOD is made when the illness, injury, disease or death was not due to the member's misconduct and was incurred when the member was present for duty or absent with authority when the illness, injury, or disease was service aggravated
 - An illness, injury, disease, or death sustained by a member in any duty status is presumed to be ILOD. This presumption may be rebutted when evidence shows the member was not in the line of duty (NILOD).
- Not in Line of Duty (NILOD) – Not Due To Member's Misconduct:
 - A determination of NILOD-Not Due to Member's Misconduct is made when a formal investigation determines the member's illness, injury, disease or death occurred while the member was absent without authority, but neither the absence nor any misconduct were the proximate cause of medical issues
 - A determination of NILOD-Not Due to Member's Misconduct is also made when an investigation determines, by clear and unmistakable evidence, the member's illness, injury, disease or underlying condition existed prior to the member's entry into military service with any branch or component of the Armed Forces or between periods of such service, and was not service aggravated
- NILOD – Due to Member's Misconduct: This determination is made following a formal investigation that determines the member's illness, injury, disease or death was proximately caused by the member's misconduct. If the member's illness, injury or disease occurred prior to service, in a non-duty status, or while the member was absent without authority, and was proximately caused by the member's misconduct, the case should be finalized as NILOD-Due to Member's Misconduct.

Standard of Proof for LOD Determinations

- Except when otherwise noted in AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, the standard of evidentiary proof used in making an LOD determination is a **preponderance of the evidence**. A preponderance of the evidence is defined as the greater weight of credible evidence.
- When determining whether a preponderance of evidence exists, all available evidence must be considered, including:
 - Direct evidence based on actual knowledge or observation of witnesses

- Indirect evidence, such as facts or statements from which reasonable inferences, deductions, and conclusions may be drawn to establish an unobserved fact, knowledge, or state of mind
- Accepted medical principles, based on fundamental deductions, consistent with medical facts that are so reasonable and logical as to create a virtual certainty that they are correct
- Preponderance of evidence is not determined by the number of witnesses or exhibits, but by all the evidence and evaluating factors such as a witness' behavior, opportunity for knowledge, information possessed, ability to recall, as well as related events and relationship to the matter being considered. In other words, a fact-finder may choose to believe a single credible witness over several witnesses the fact-finder does not find credible.

Types of Processing for LOD Determinations

- Administrative LOD:

- When a military medical provider sees a member under any of the below circumstances, he/she makes an administrative determination that the member's condition is ILOD. This determination is final and no further action is required.
 - As a hostile casualty (other than death)
 - As a passenger in a common carrier or military aircraft
 - The injury, illness or disease clearly did not involve misconduct, abuse of drugs or alcohol, or self-injurious behavior
 - The injury or illness is simple, such as a sprain, contusion or minor fracture, and is not likely to result in permanent disability
 - For ARC, the medical provider may make an administrative determination to document a minor condition as ILOD if there is no likelihood of permanent disability, hospitalization or requirement for continuing medical treatment

- Informal LOD:

- When an administrative determination is not appropriate, the commander investigates the circumstances of the case to determine if the member's illness, injury, disease or death occurred while the member was absent without authority, is due to the member's own misconduct or EPTS

- Formal LOD:

- Made by higher authorities based upon a thorough investigation conducted by a specially appointed disinterested Investigating Officer (IO), in the grade of O-3 or above and senior to the ill, injured or deceased member
- Required to support a determination of NILOD unless the condition EPTS and was not service aggravated
- The immediate commander may also recommend a Formal LOD determination when the member's illness, injury, disease or death occurred:
 - Under strange or doubtful circumstances; or
 - Under circumstances the commander believes should be fully investigated
- DD Form 261, *Report of Investigation Line of Duty and Misconduct Cases*, is used in all formal LOD investigations

LOD Determination Processing for Sexual Assault Cases

- A member who has incurred an injury, illness or disease as a result of sexual assault while performing active duty service or IDT must have his or her LOD processed in accordance with DoDI 6495.02, Volume 1, *Sexual Assault Prevention and Response: Program Procedures*
- The LOD determination process will vary depending on whether the member elects unrestricted or restricted reporting

LOD Determinations for Specific Situations

- See AFI 36-2910, Attachment 2 for guidance on common LOD situations

REFERENCES

DoDI 6495.02, Volume 1, *Sexual Assault Prevention and Response: Program Procedures* (28 March 2013), incorporating Change 5, 9 April 2021

AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay* (8 October 2015)

DD Form 261, *Report of Investigation Line of Duty and Misconduct Status* (25 March 2021)

AF Form 348, *Line of Duty Determination* (16 October 2020)

AF Form 348R, *Line of Duty Determination for Restricted Report of Sexual Assault* (20 October 2015)

DISABILITY EVALUATION SYSTEM (DES)

Commanders must constantly balance their concern for mission accomplishment with their concern for service members' health and safety. Challenges can arise when service members develop injuries, illnesses, or physical disabilities or limitations that impact their ability to perform their duties or ability to deploy. To resolve these cases, the Department of Defense (DoD) has developed the Disability Evaluation System (DES) to allow the Secretary of the Air Force (SecAF) to remove from active duty those who can no longer perform the duties of their office, grade, rank, or rating and ensure fair compensation to members whose military careers are cut short due to service-incurred or service-aggravated medical conditions. Of note, Air Force Reserve (AFR) and Air National Guard (ANG) members who are on active duty orders for more than 30 days and who are medically disqualified for impairments related to their military status or performance of duty may enter the DES. Air Reserve Component (ARC) members who are not on a call to active duty of more than 30 days and who are pending separation for non-duty related medical conditions may enter the DES for a determination of fitness only.

PROFILES AND DUTY LIMITATIONS

- Service members may develop injuries, illnesses, or disabilities that impact their ability to perform military duties. In such cases, healthcare providers should communicate appropriate medical recommendations regarding fitness for duty and/or duty limitations to commanders so commanders are able to determine the optimum, yet safe, utilization of members in their charge.
- Healthcare providers should promptly notify commanders when a service member's health and/or ability to accomplish the mission is at risk due to health problems. AF Form 469, *Duty Limiting Condition Report*, is used to accomplish this task. AF Form 469 includes, among other things, the healthcare provider's recommendation regarding specific duty limitations and/or restrictions for service members.
 - Because commanders must know the fitness for duty status of their members, the Health Insurance Portability and Accountability Act (HIPAA) allows for disclosures of health information to commanders in limited circumstances including fitness for duty determinations
- The mere presence of a physical defect or condition does not qualify a member for disability retirement or discharge
 - Disability evaluation begins only when examination, treatment, hospitalization, or substandard performance results in referral to a Medical Evaluation Board (MEB) by a military healthcare provider. If the MEB determines the member's condition is potentially "unfitting," meaning the member is unable to perform the duties of his or her Air Force Specialty Code (AFSC), deploy, and/or take a full-component physical fitness test, the case will then be forwarded to the Physical Evaluation Board (PEB) at the Air Force Personnel Center (AFPC).

Conflict Resolution

- Commanders may consult with the medical unit's Senior Profiling Officer (SPO) to maximize use of personnel with Duty Limiting Conditions (DLCs). An assessment based on operational risk to personnel assigned to a unit is critical to maintaining unit readiness at the highest degree possible.
 - In some situations, a commander may disagree with a health care provider regarding a service member's profile and/or recommended duty limitations or mobility restrictions (MR)
 - A commander who non-concurs with a MR must contact the installation's Chief of Aerospace Medicine (MDG/SGP) within seven duty days of receipt of the mobility restricting AF Form 469. No contact from the commander will be considered concurrence with a MR.

- If the MDG/SGP and unit commander disagree, the member can be placed on mobility status with the concurrence of the commander's next reporting official (normally the member's group commander)
- If the second level commander non-concurs as well, the final commander acting on AF Form 469 issues a completed copy to the member after the MDG/SGP notifies the Medical Standards Management Element (MSME) of the action and MSME generates a new AF Form 469

Rights of Airmen and Guardians

- The law requires government legal representation for all Airmen and Guardians in the DES
 - An Airman or Guardian who is pending an MEB or PEB may contact the Office of Disability Counsel (ODC) by telephone or e-mail for consultation concerning the member's rights and elections at any stage of the process and should do so as early as possible
 - The right to representation formally begins upon a member's receipt of results from the Informal Physical Evaluation Board (IPEB)
 - These rights ensure that no member may be retired or separated for physical disability without a full and fair hearing, and the award of fair compensation to those whose military careers are cut short due to a disability incurred during, or permanently aggravated by, military service

Office of Disability Counsel (ODC)

- The ODC is comprised of active duty, AFR, and ANG judge advocates, civilian attorneys, and paralegals
- The ODC's mission is to provide prompt, professional, and independent legal counsel to Air and Space professionals who are either trying to return to the fight or are facing medical separation
 - At initial stages, the ODC team can provide general information to assist Airmen and Guardians in understanding their rights and responsibilities during the DES process
 - As a service member progresses through the DES, the ODC can provide more specific advice aimed at developing strategy to reach desired outcomes, whether that be to return to duty, medically retire, or receive a medical discharge with severance pay
 - The ODC provides representation at the Formal Physical Evaluation Board (FPEB) and assist with appeals of Veterans Affairs (VA) ratings for conditions determined unfitting by the Air Force or Space Force
- The ODC staff reports directly to an independent chain of command in order to allow for zealous advocacy on behalf of the individual undergoing DES processing, within ethical boundaries

DES Stages

- The MEB is the first step for assessing members whose retention is questionable due to health concerns or injuries
 - The MEB consists of three physicians appointed by the medical group commander (MDG/CC) to determine whether the member has any medical issues that could make the member unfit for continued military service. In all mental health cases, one of the three physicians must be a psychiatrist.
 - The MEB may result in either the member's return to duty (with or without an Assignment Limitation Code "C") or referral to the IPEB

- The IPEB consists of two board members (one physician and one personnelist) and adjudicates cases based on a records-only review
 - The service member's immediate commander must provide a statement describing the impact of the medical condition upon the member's ability to perform his or her normal military duties and deploy. In most cases, the commander's letter is accorded great weight by the IPEB.
- Service members have the right to appeal their results from the IPEB to the FPEB. If the member decides to appeal, he or she must elect to appeal within 10 days of receiving the IPEB results.
- The FPEB consists of three board members (one physician and two personnelists), one of whom serves as the board president. The FPEB hearing convenes in a closed door session with the board members, the service member whose case is under appeal, and his or her assigned counsel. The service member also has the right to have witnesses testify on his or her behalf.
 - The FPEB is another area where a commander may play a persuasive role in the service member's disability processing. While an Airman or Guardian may not be forced to submit derogatory information, a commander in support of a member may provide testimony or statements in support of the member's goal.
- The IPEB and FPEB generally recommend one of the following three outcomes:
 - Return to duty with or without an assignment limiting code
 - Medical retirement
 - Discharge with severance pay

Relationship to Line of Duty Determinations

- DES procedures should not be confused with Line of Duty (LOD) determinations
- Whereas DES procedures are used to determine whether medical issues limit a service member's ability to perform his/her duties (and, ultimately, to remain in the Air Force or Space Force), an LOD determination is an administrative tool for determining a service member's duty status at the time an injury, illness, disability, or death is incurred

Dual Processing and Special Cases

- Commanders must inform the Physical Evaluation Board Liaison Officer (PEBLO) of any pending administrative or unfavorable action arising before or during the member's DES processing
- Service members facing administrative discharge for which the only possible characterizations are honorable or under honorable conditions (general) will be decided by the Secretary of the Air Force Personnel Council (SAFPC) under AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation*
- Under AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, service members facing administrative discharge where an under other than honorable conditions (UOTHC) service characterization is possible may receive dual action processing if the dual action authority finds a clear and evident causal connection between a member's unfitting condition and the misconduct forming the basis of discharge
- The dual action authority for active duty officers and enlisted members with at least 16 years of total active federal military service (TAFMS) is AFPC's Physician Education Branch (AFPC/DP2NP), with the final decision authority resting at SAFPC

- The dual action authority for active duty enlisted members with less than 16 years TAFMS at the time of anticipated discharge is the member's general court-martial convening authority (GCMCA)
 - If the member goes to a court-martial and does not receive a punitive discharge, then the disability case will be processed
 - Alternatively, administrative action will be processed if a member is found fit for duty in the DES process
- Members who are in military confinement are not eligible for processing until sentence is completed and they are placed in a returned to duty status

REFERENCES

- DoDI 1332.18, *Disability Evaluation System (DES)* (5 August 2014), incorporating Change 1, 17 May 2018
- AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay* (8 October 2015)
- AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation* (15 July 2019), incorporating Change 1, 4 December 2020
- AFMAN 41-210, *Tricare Operations and Patient Administration* (10 September 2019)
- DAFMAN 48-123, *Medical Examinations and Standards* (8 December 2020), *Duty Limiting Condition Report* (30 January 2020)

OFFICER GRADE DETERMINATIONS (OGD)

While the grade at which an officer retires after serving at least twenty years is normally the highest grade held, federal law permits the Secretary of the Air Force (SecAF) to retire both regular and reserve officers in a lower grade if their service has not been “satisfactory.” This authority has been delegated to the Director, Air Force Review Boards Agency for those in the grade of colonel and below. In those cases where an officer’s conduct or record raises questions as to the quality of his or her service in a particular grade, an officer grade determination (OGD) is required.

Process

- When an officer applies for retirement, any commander in the officer’s chain may initiate an OGD if there is evidence the officer’s service in their current grade has been less than satisfactory
 - In making the “satisfactorily held” determination, consider the nature and length of the officer’s improper conduct, the impact the conduct had on military effectiveness, the quality and length of the officer’s service in each grade at issue, past cases involving similar conduct, and the recommendations of the officer’s command chain. A single incident of misconduct can render service in a grade unsatisfactory despite a substantial period of otherwise exemplary service.
- A commander **MUST** submit an OGD through the major command (MAJCOM) if the officer has:
 - Applied for retirement in lieu of judicial or administrative separation
 - A conviction by court-martial
 - A conviction by a civilian court for misconduct which did (or would) result in a mandatory comment and referral in the member’s next officer performance report (OPR), training report (TR), or Promotion Recommendation Form (PRF), in accordance with AFI 36-2406, *Officer and Enlisted Evaluation Systems*
 - Received nonjudicial punishment (NJP) pursuant to Article 15, Uniform Code of Military Justice (UCMJ), or a reprimand, since the officer’s last promotion
 - Been the subject of any substantiated adverse finding from an officially documented investigation, proceeding, or inquiry (except minor traffic infractions), regardless of the command action taken against the officer (if any) since his or her last promotion
- A commander **MAY** submit an OGD through the MAJCOM in other cases if he or she believes an OGD is appropriate
- At the time an officer applies for retirement, the commander will review the officer’s record to determine if any of the above conditions exist. If, based on that review, one of the above conditions exists, the commander initiates an OGD.
 - The commander must notify the officer that an OGD is being initiated and why
 - All information relevant and material to the determination of “satisfactory service” must be provided
 - The officer is given 10 calendar days to respond
- The commander will make a recommendation regarding the officer’s retirement grade. That recommendation must accompany the retirement application as it is forwarded to the Military Personnel Flight (MPF).

- For retirement in lieu of judicial or administrative separation, the officer is considered on notice that he or she is subject to an OGD based on that administrative or judicial action. The officer's commander is not required to separately notify the officer of the OGD unless the commander intends to add or consider evidence that was not already provided to the officer during the underlying administrative or judicial action.
- OGD packages, including matters and documents submitted by the member, are forwarded through command channels to Air Force Personnel Center (AFPC), which sends the case file to the Secretary of the Air Force Personnel Council (SAFPC) for decision
- OGD packages for general officers require SecAF resolution, with or without referral to a formal OGD Board. Contact AF/JA – Military Justice, Investigations, Inquires, and Relief (JAJI) for guidance in general officer cases
- Any questions concerning officer misconduct, reporting requirements, or the appropriate administrative or judicial response to misconduct should be addressed through the servicing staff judge advocate (SJA) or MPF

REFERENCES

Commissioned Officers, 10 U.S.C. § 1370

Reserve Officers: Grade on Transfer to Retired Reserve, 10 U.S.C. § 12771

AFI 36-2023, *The Secretary of the Air Force Personnel Council (SAFPC)* (3 April 2018)

AFI 36-3203, *Service Retirements* (29 January 2021), corrective actions applied, 23 February 2021

AFI 36-2406, *Officer and Enlisted Evaluations Systems* (14 November 2019), including AFI36-2406_AFGM2021-01, 13 January 2021

TATTOOS/BRANDS, BODY PIERCING, AND BODY ALTERATION

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, governs the use of tattoos, body piercing, and body alterations by Department of the Air Force members. Failure to abide by these instructions may subject Airmen and Guardians to prosecution for violation of a lawful general regulation under Article 92 of the Uniform Code of Military Justice (UCMJ). Additionally, commanders retain authority to be more restrictive for covering tattoos, body ornaments, and personal grooming based on legal, moral, safety, sanitary, or foreign country cultural reasons.

Tattoos, Brands, or Body Markings

- A tattoo is defined as a picture, design, or marking made on the skin or other areas of the body by staining it with an indelible dye, or by any other method, including pictures, designs, or markings only detectable or visible under certain conditions (such as ultraviolet or invisible ink tattoos). A brand is defined as a picture, design, or other marking that is burned into the skin or other areas of the body. Body markings are pictures, designs, or other markings as a result of using means other than burning to permanently scar or mark the skin. Commanders will use the provisions in AFI 36-2903 in determining the acceptability of tattoos, brands, and body markings displayed by members in uniform.
- Authorized: Tattoos, brands, or markings are authorized on the chest, back, arms, legs, and a ring tattoo on one finger on one hand (a single band no more than 3/8 of an inch wide, below the knuckle and above finger joint). Note that Airmen and Guardians who were previously authorized to have such hand tattoos prior to 9 January 2017 are “grandfathered” in under the old policy standards.
 - Authorized hand, arm, and leg tattoos can be exposed/visible in uniform
 - Chest and back tattoos will not be visible through any uniform, or visible while wearing an open collar uniform
 - Cosmetic tattooing (for men or women), when directed by qualified medical personnel to correct a medical condition, and for women if done to apply permanent facial makeup in accordance with dress and appearance standards, is permitted
- Unauthorized: Tattoos, brands, or body markings anywhere on the body that are indecent or obscene, commonly associated with gangs or extremist/supremacist organizations, or that advocate sexual, racial, ethnic, or religious discrimination are prohibited in and out of uniform. Tattoos, brands, or body markings with unauthorized content that are prejudicial to good order and discipline or the content is of a nature that tends to bring discredit upon the Air Force or Space Force are prohibited both in and out of uniform. Likewise, other than the exceptions (see above), tattoos, brands, or body markings are prohibited on the hands, head, neck (anything visible above the open collar neckline), face, tongue, lips, or scalp of Airmen and Guardians. Airmen and Guardians may not simply cover up tattoos, brands, or body markings with bandages or make-up in order to comply with this policy — they must instead comply with the removal/alteration policy.

Tattoo Removal/Alteration Policy

- Department of the Air Force members who have or receive unauthorized content tattoos, brands, or body markings are required to initiate tattoo, brand, or body marking removal and alteration. At the commander's discretion, members may be seen on a space and resource available basis, in a Department of Defense (DoD) medical treatment facility for voluntary tattoo, brand, or body marking removal. When DoD resources are not available, members may have the tattoo, brand, or body marking removed or altered at their own expense outside of DoD medical treatment facilities. Permissive TDY is not authorized for this purpose; therefore, travel is at member's expense.
- Members who fail to remove or alter unauthorized tattoos, brands, or body markings in a timely manner will be subject to appropriate quality force management actions. The requirement to comply with Department of the Air Force guidance is not negated by an inability to obtain removal at government expense. The member is ultimately responsible for complying with Department of the Air Force guidance, while supervisors and commanders are charged with enforcing standards via appropriate actions.

Body Piercing

- Earrings: Male Airmen and Guardians are not authorized to wear earrings while in uniform or in civilian attire for official duty, but are authorized to wear earrings in civilian attire while off duty on a military installation. Female Airmen and Guardians may wear small (not exceeding 6 mm in diameter) conservative (moderate, being within reasonable limits; not excessive or extreme) round or square white diamond, gold, white pearl, or silver earrings as a set with any uniform combination. If member has multiple holes, only one set of earrings are authorized to be worn in uniform and will be worn in the lower earlobes. Earrings will match and fit tightly without extending below the earlobe unless the piece extending is the connecting band on clip earrings.
- On official duty in uniform or civilian attire (on or off a military installation): With the exception of earrings for females (see above), all members are prohibited from attaching, affixing, or displaying objects, articles, jewelry or ornamentation to or through the ear, nose, tongue, eye brows, lips, or any exposed body part (includes visible through clothing)
- Off duty in civilian attire, on a military installation: With the exception of earrings (see above) and areas in/around military family and privatized housing, Air Force and Space Force members are prohibited from attaching, affixing and/or displaying objects, articles, jewelry or ornamentation to and/or through the ear, nose, tongue, eye brows, lips, or any exposed body part (includes visible through clothing)

Body Alteration/Modification

- Members are prohibited from altering or modifying their bodies if the alteration is intentional and results in a visible, physical effect that disfigures, deforms, or otherwise detracts from a professional military image
- Examples include, but are not limited to, tongue splitting or forking, tooth filing, and acquiring visible, disfiguring skin implants, and gouging (piercing holes large enough to permit light to shine through)

REFERENCE

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel* (7 February 2020), incorporating Change 2, 15 March 2021

RETALIATION

Under Article 132, Uniform Code of Military Justice (UCMJ), it is a criminal offense for any military member to wrongfully take or threaten to take an adverse personnel action against a person who has made or is planning to make a protected communication. Similarly, it is an offense to wrongfully withhold or threaten to withhold a favorable personnel action from a person who either made or planned to make a protected communication. The Inspector General's (IG) office is the primary authority to handle complaints of retaliation.

Definitions

- The term retaliation includes retaliation, ostracism, and maltreatment
 - Retaliation: Taking or threatening to take an adverse personnel action, withholding or threatening to withhold a favorable personnel action, or conducting a retaliatory investigation with respect to a military member because the member reported a criminal offense (investigated by IG only)
 - Personnel action: Any action taken on a service member that affects or has the potential to affect that person's current position or career. Examples include promotion, disciplinary or other corrective action, transfer or reassignment, performance evaluations, decisions concerning pay, benefits, awards or training, relief and removal, separation, discharge, referral for mental health evaluations, and any other personnel action defined by law.
 - DODD 7050.06, *Military Whistleblower Protection*, also defines a personnel action as a significant change in duties and responsibilities that is inconsistent with the service member's grade
 - Ostracism: Excluding from social acceptance, privilege, or friendship with the intent to discourage reporting a criminal offense or discouraging the due administration of justice (investigated by command)
 - Maltreatment: Treatment by peers or other persons viewed objectively that is abusive or otherwise unnecessary for any lawful purpose to discourage reporting a criminal offense or the due administration of justice that results in physical or mental harm or suffering or reasonably could have caused physical or mental harm or suffering (investigated by command)

Protected Communications

- There are two types of protected communications:
 - A lawful communication to a Member of Congress or an IG
 - A communication to a covered individual complaining of or disclosing a violation of law or regulation (including sexual harassment or unlawful discrimination) or reporting gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety
 - Covered individuals include (but are not limited to): a Member of Congress, an IG, a member of a Department of Defense (DoD) audit, inspection, investigation, or law enforcement organization, any person or organization in the chain of command, a court-marital proceeding, or any other person or organization designated pursuant to regulations for such communications

Actions in Response to Retaliation

- A commander or supervisor must take appropriate action if it is reasonable to believe retaliation has occurred. At a minimum, the member or members suspected of engaging in retaliation will be ordered to cease from engaging in any further retaliation.
- As soon as practicable, the alleged victim, or other military member who is believed to have been retaliated against, will be informed that command is aware of the suspected act or acts of retaliation, and that the alleged offenders have been ordered to cease from engaging in any further retaliation
- The individual retaliated against will be advised to report any further acts of retaliation
- Military members who violate the specific prohibitions contained in paragraphs 2.3.7, 3.2, 4.2.1, 5.1, and 5.2.2 of AFI 36-2909, *Air Force Professional Relationships and Conduct*, can be disciplined for and/or prosecuted under Articles 92, 93, 93a, 132, and 134 of the UCMJ for Regular Air Force (RegAF), Air Force Reserve (AFR) and Air National Guard (ANG) members in Title 10 status, or applicable state military codes for ANG members in Title 32 status
- For all cases involving retaliation, including reprisal and restriction, contact both the IG and servicing legal offices

REFERENCES

UCMJ arts. 92, 93, 93a, 132, 134

DoDD 7050.06, *Military Whistleblower Protection* (17 April 2015)

AFI 36-2909, *Air Force Professional Relationships and Conduct* (14 November 2019)

AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018), incorporating Change 1, 30 September 2020

DAFPD 90-3, *Inspector General* (3 February 2021)

NO CONTACT ORDERS AND MILITARY PROTECTIVE ORDERS

Commanders may issue “no contact orders” to personnel under their command when the commander deems it reasonably necessary in order to protect third parties from physical harm (most frequently spousal, intimate partner, or child abuse) or to prevent a violation of the Uniform Code of Military Justice (UCMJ). No contact orders issued for the purposes of preventing spousal, child, or intimate partner abuse are known as “military protective orders” (MPOs) and should be completed on a DD Form 2873, *Military Protective Order*.

Under certain circumstances, commanders shall issue and monitor compliance with an MPO when necessary to safeguard a victim, quell a disturbance, and maintain good order and discipline while a victim has time to pursue a protective order through a civilian court, or to support an existing civilian protective order. When possible, commanders should consult with their staff judge advocate (SJA) before issuing no contact orders or MPOs.

Definition

- No contact orders are similar to civilian *temporary* restraining orders. They are orders directed to military personnel, prohibiting them from having communication or physical contact with a particular person or persons.

Authority to Issue No Contact Orders

- May be issued by the commander of the person concerned
- Standard: Reasonably necessary to ensure the safety and security of persons within their command or to protect other individuals from persons within the command

Purpose

- The lawful purpose of a no contact order is to protect others and prevent misconduct punishable by the UCMJ
 - Protect: Most often used to protect victims of domestic violence, child abuse, or crime victims from contact with the accused pending court-martial
 - Prevent: Often used to prevent future UCMJ misconduct such as unprofessional relationships in violation of AFI 36-2909, *Air Force Professional Relationships and Conduct* or fraternization in violation of Article 134, UCMJ

Scope of No Contact Orders

- No contact orders must be tailored to meet the specific needs of an individual victim
- No contact orders may limit communication and physical interactions between a military member over whom the commander exercises authority and a third party. Limitations may include, but are not limited to:
 - Refrain from contacting, harassing, or touching certain named persons
 - Remain away from specific areas, such as home, schools, and public facilities
 - Do, or refrain from doing, certain acts or activities
- No contact orders **MAY NOT** preclude the defense counsel of a member from contacting a potential witness as part of counsel’s investigation in a pending case

Duration

- No contact orders should state the term length, be limited in duration, and may be renewed as circumstances warrant

Form of No Contact Orders

- No contact orders should be in writing with receipt confirmed in writing by the recipient
 - Verbal no contact orders should only be issued under exigent circumstances and put into writing as soon as possible after issuance
- Commanders should use DD Form 2873, *Military Protective Order*, when issuing a no contact order to prevent potential spousal, intimate partner, or child abuse

Relationship of Military Protective Orders to Civilian Restraining Orders

- MPOs can be issued in conjunction with, or in addition to Civilian Protective Orders (CPO) issued by civilian courts. They each have their own independent source of authority. Commanders will advise MPO protected persons that MPOs are not enforceable by civilian authorities off-base, so protected persons may want to seek a CPO.
- Civilian court issued restraining orders dealing with domestic violence incidents have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued such order
- The terms of an MPO should not contradict the terms of a CPO
- A commander may issue an MPO with terms that are more restrictive than those in the CPO to which the member is subject
- Violations of CPOs are enforceable in the civilian court which issued the order
 - If the civilian court takes no action to punish violations of the order, the military could pursue administrative or disciplinary action. Before doing so, **ALWAYS** consult your SJA.
- MPOs will be entered into the National Crime Information Center (NCIC) database. This ensures that civilian law enforcement agencies are aware of the MPO and can notify military authorities if violations of the MPO occur off-base.

Enforceability

- Depending upon the circumstances, violation of an MPO is punishable under Article 90, UCMJ, or Article 92, UCMJ

REFERENCES

Civilian Orders of Protection: Force and Effect on Military Installations, 10 U.S.C. § 1561a(a)

Duration of Military Protective Orders, 10 U.S.C. § 1567

Mandatory Notification of Issuance of Military Protective Order to Civilian Law Enforcement,
10 U.S.C. § 1567a

Rule for Courts-Martial 304

DoDI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (21 August 2007), incorporating through Change 4, 26 May 2017

DoDI 6495.02, Volume 1, *Sexual Assault Prevention and Response: Program Procedures* (28 March 2013), incorporating through Change 5, 9 April 2021

AFI 36-2909, *Air Force Professional Relationships and Conduct* (14 November 2019)

AFMAN 71-102, *Air Force Criminal Indexing* (21 July 2020)

DD Form 2873, *Military Protective Order* (February 2020)

DAFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI51-201_
DAFGM2021-01, 5 January 2021

ATTACHMENT

Template No Contact Order

Suggested Format for No Contact Order

MEMORANDUM FOR XXXXXXXX

FROM: [Squadron]/CC

SUBJECT: No Contact Order

(Date)

1. Order. It has come to my attention that you are under investigation for violations of the Uniform Code of Military Justice (UCMJ) Article ###, [Article Name]. To ensure the good order and discipline of this unit, you are hereby ordered:

Not to have *any contact* with [RANK/FULL NAME]. “Any contact” means just that — physical, verbal, telephonic, text message, e-mail, social media, etc. Additionally, you are ordered not to use another person to contact [RANK/FULL NAME] on your behalf. This order is not intended to prevent any counsel who may represent you in the future from preparing a defense, however, you are not to use any counsel as a means of contacting [RANK/FULL NAME] for personal communications on your behalf.

You are further ordered not to come within 100 feet of [RANK/FULL NAME] unless required by military duties and previously approved by me. Should you inadvertently encounter [RANK/FULL NAME] at any other location, you will immediately distance yourself by 100 feet and report the inadvertent contact to your immediate supervisor.

2. Duration of Order. This order will remain in effect until _____, unless this order is otherwise modified, extended or rescinded by me.

3. Relief from/Questions about Order. If you feel you need relief from this order at any time or if you have any questions regarding its provisions, call _____ at _____ (DP) _____, (HP) _____, (Cell #). If you are unable to reach _____, you may contact me at my office or through the Command Post at _____.

4. Consequences of Violating Order. Take note that violations of this order may result in adverse administrative action or punishment under the UCMJ, to include trial by court-martial.

5. Receipt/Understanding of Order. Acknowledge receipt and understanding below.

I.M. JUSTICE, Lt Col, USAF
Commander

1st Ind to [Squadron]/CC, _____ (date), No Contact Order

MEMORANDUM FOR [Squadron]/CC

I understand and acknowledge receipt of this order on _____.

XXXXX, [rank], USAF

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CHAPTER EIGHT: PERSONNEL ISSUES – FAMILY AND NEXT OF KIN

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FAMILY ADVOCACY PROGRAM

The mission of the Department of the Air Force Family Advocacy Program (FAP) is to build healthy communities by implementing programs and policies designed for the prevention and treatment of domestic abuse, child abuse and neglect, and Problematic Sexual Behavior in Children and Youth (PSB-CY). The FAP enhances Department of the Air Force readiness by promoting family and community health and resilience. The FAP consists of prevention services, maltreatment intervention, and research and evaluation.

Applicability of FAP to Air Force Reserve and Air National Guard

- Air Force Reserve Command (AFRC):

- The AFRC does not maintain a FAP. Reserve Airmen and their families, when not eligible for care in a military treatment facility (MTF), are routinely managed by civilian agencies in conjunction with civilian law enforcement agencies.

- Air National Guard (ANG):

- The AF FAP provides services to ANG members when they are activated in Title 10 or Title 32 status and are not in the dual status Technician Program. Consult with the servicing staff judge advocate (SJA) to determine applicability.

Reporting Maltreatment

- Maltreatment is a general term encompassing child abuse or neglect and partner abuse or spousal neglect
- Notice of suspected abuse cases come from many sources to include security forces blotter, commanders, co-workers, medical care providers, childcare providers, anonymous tips, etc.
- All Department of the Air Force personnel, military or civilian, have a duty to report all incidents of suspected family maltreatment to the FAP. The identity of the person making the notification is kept confidential and is not released to the family allegedly involved.
- Report suspected cases to the FAP and military law enforcement
- Adult victims of domestic abuse have two reporting options:
 - *Unrestricted Reporting:* Allows the victim to report an incident using the chain of command, law enforcement agencies, and family advocacy for clinical intervention. Victims who choose to pursue an official command or criminal investigation of an incident should use these reporting channels.
 - *Restricted Reporting:* Allows the victim, who is eligible to receive military medical care, the option of reporting an incident of domestic abuse to specified individuals for the purpose of receiving medical care and other services without initiating the investigative process or notification to the victim's or alleged offender's commander

The Family Advocacy Committee (FAC)

- The ultimate responsibility to implement the FAP rests with the installation commander. The MTF commander is responsible for each of the three FAP components and chairs the family advocacy committee (FAC).
- Members of the FAC normally include: installation commander (or designee), MTF commander, the family advocacy officer (FAO), family advocacy outreach manager, Domestic Abuse Victim Advocate (DAVA), Airmen and Family Readiness director, staff judge advocate (SJA) or designee, Security Forces Squadron (SFS) commander or designee, Air Force Office of Special Investigations

(AFOSI) detachment commander or designee, chaplain, installation command chief master sergeant (CCC), and a Department of Defense Education Activity (DoDEA) representative

- The FAC may add other members as appropriate, such as a Special Victims' Counsel or representatives from civilian agencies with a direct role in supporting military families at risk of experiencing domestic abuse or child maltreatment

Family Advocacy Officer (FAO)

- The FAO manages the installation FAP
- The FAO coordinates the central registry board (CRB) and chairs the clinical case staffing (CCS), child sexual maltreatment response team (CSMRT), high risk for violence response team (HRVRT), and the new parent support program (NPSP) case-staffing

The Central Registry Board (CRB)

- The CRB is a multidisciplinary team that makes administrative determinations for suspected family maltreatment, to include which incidents require entry into the Air Force Central Registry database
- CRB meets at the call of the FAO, normally monthly. Membership is determined by the FAC, but should include the chair (installation vice commander), the CCC, a judge advocate (JA), and representatives from SFS, AFOSI, FAO, and other relevant agencies.
- The unit commander of any member whose case will be discussed at the CRB should attend the CRB meeting for their member
- CRB discussions are confidential
- Duties of the CRB:
 - Make incident status determinations (ISDs) on each allegation of maltreatment within 60 days of referral
 - Ensure involved adult family members, adult victims, and adult offenders receive notification of CRB ISDs

Child Sexual Maltreatment Response Team (CSMRT)

- Membership includes the FAO, AFOSI representative, legal office representative, and other members appointed by the unit commander and approved by the FAC
- The goal of the team is to minimize risk and trauma to the victim and family and ensure coordinated decision making and case management
- The team is activated by the FAO immediately upon receipt of child sexual abuse allegations. The team coordinates a course of action by determining how organizations will proceed in making notifications, conducting interviews, scheduling medical exams, arranging for safety of the victim and family members, and conducting psychosocial assessments.

Problematic Sexual Behavior in Children and Youth (PSB-CY)

- Defined as behavior initiated by children and youth under 18 years old that involve sexual body parts in a manner that deviates from normative and typical sexual behavior and are developmentally inappropriate or potentially harmful to the individual exhibiting the behavior, the individual(s) impacted by the behavior, or others
- The FAP's mission scope has been recently expanded to allow formal education and intervention services for PSB-CY
- If the referral meets the definition of PSB-CY, the FAP response mechanism will be the CSMRT

High Risk For Violence Response Team (HRVRT)

- Members include the FAO, FAP clinician working with the family, sponsor's squadron commander, JA, SFS representative, mental health clinical provider, AFOSI, victim advocate, and other agencies as appropriate
- The team is activated when there is a threat of immediate and serious harm to family members, unmarried intimate partners or FAP staff. The team addresses safety issues, risk factors, and develops and implements a management and tracking mechanism for high-risk individuals.

Child Neglect and Abandonment

- Most Air Force and Space Force installations will have several cases each year of alleged child abuse or neglect through parental abandonment (i.e., leaving children alone in military family housing without adult supervision)
- Some installations have addressed this issue by having the FAC draft guidelines to assist parents in assessing whether a child is mature enough to be left unattended
- The FAC only *proposes* guidelines. Situations must be evaluated individually.

REFERENCE

DoDI 6400.01, *Family Advocacy Program* (1 May 2019)

DAFI 40-301, *Family Advocacy Program* (13 November 2020)

CHILD CUSTODY AND THE MILITARY

Child custody laws vary from state to state, but generally employ a “best interest of the child” standard. Courts will usually look at many factors in determining the child’s best interests and very rarely will one single variable be determinative. Military members who are faced with child custody disputes may be emotional and under substantial stress. They will likely need assistance in navigating state laws and court proceedings. In particular, they should know that both state and federal laws have been enacted to protect a service member’s custodial interests. Furthermore, they should understand that absences dictated by military service will not be a sole factor in withholding custody.

State Jurisdiction

- The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has been enacted by nearly all states and U.S. territories, limits jurisdiction in child custody cases to one state — the “home” state. Forty-nine states and commonwealths, the District of Columbia, and the U.S. Virgin Islands have adopted the UCCJEA. Massachusetts, Puerto Rico, Guam, Marianas Islands, and American Samoa have not yet adopted the Act.
 - The home state is defined as the state where the child has lived for six consecutive months (or since birth if the child is less than six months old) prior to the commencement of the custody proceedings
 - If the child has not lived in one state for at least six consecutive months, then jurisdiction lies with the state that has (1) “significant connections” with the child and at least one parent; **AND** (2) “substantial evidence concerning the child’s care, protection, training, and personal relationships.” If more than one state meets this criteria then the states must agree on the state that will assume jurisdiction.
 - Continuing Exclusive Jurisdiction: The state that makes the initial custody determination will maintain jurisdiction for modifications. If another state later has more “significant connections” with the child, the original state may relinquish jurisdiction.
 - Emergency Jurisdiction: A court in a state other than the home state may assume temporary jurisdiction when a child is (1) present in the state; and (2) has been abandoned or subjected to or threatened with mistreatment or abuse
 - Enforcement of Final Custody Orders: Prosecutors and law enforcement in any state may utilize civil proceedings to enforce a custody order

Best Interest of the Child Standard

- Courts will usually make custody decisions based primarily on the child’s best interest. Factors the court may consider include, but are not limited to, the:
 - Degree of emotional attachment of the child to each parent
 - Child’s age, gender, and mental/emotional/social development
 - Child’s preference (for children ages 12-14 in most states)
 - Child’s comfort in his/her home, school, and community
 - Involvement of each parent
 - Physical, emotional, social, and financial stability of each parent
 - Willingness of each parent to cooperate with the other
 - History of domestic violence or child abuse

Deployment as a Factor in Determining Custody Arrangements

- A review of military child custody cases failed to reveal any instances where custody was determined solely based on the issue of deployment or the threat of deployment. Several laws were enacted that help ensure this remains the case. For instance:
 - Nearly every state has provisions addressing custody and visitation of deployed parents, including 14 states that have adopted the Uniform Law Commission's Deployed Parents' Custody and Visitation Act (UDPCVA)
 - The Servicemembers Civil Relief Act (SCRA) was also amended to limit a state court's consideration of a member's deployment as the sole factor in determining the best interest of the child, though it does not create a federal right of action
- The effects of deployment are often considered by the courts as one of the factors in determining the best interest of the child

Mobility as a Factor in Determining Custody Arrangements

- The impact that a change to a child's environment (e.g., frequent PCS moves) has on a child's well-being is also likely to be considered by individual judges and guardians ad litem in determining the best interest of the child
- Although each child will handle these disruptions differently and will need to be considered on an individual basis, a recent study concluded that frequent military moves do not typically have a negative impact on a child's overall well-being
- Commanders should encourage members to take advantage of the many resources available to support military families, including child development centers, outdoor recreation and recreational sports leagues, religious services, Airman and Family Readiness Centers, military treatment facilities, and other base activities
 - Members may be able to point to the unique sub-culture and community support that can be found in the military when presenting their interests in a child custody proceeding
 - Members should also establish and keep current an effective Family Care Plan, including civilian employees who are not members of the Department of Defense (DoD) Civilian Expeditionary Workforce
 - NOTE: DoDI 1342.19_AFI 36-2908, *Family Care Plans*, requires certain service members to plan for contingencies in the care and support of dependent family members. The following service members shall develop and submit a family care plan and have a formal family care plan documented on AF Form 357, *Family Care Certification*.
 - Single parents
 - Dual-service member couples with dependents
 - Married service members with custody or joint custody of a child whose non-custodial biological or adoptive parent is not the current spouse of the service member, or who otherwise bear sole responsibility for the care of children under the age of 19, or for others unable to care for themselves in the absence of the Member
 - Service members who have primarily responsibility for dependent family members

Child Support

- Child support issues also fall under state law and are determined by state courts
 - Military members who are going through a divorce or custody determination should document the support believed to be provided
- Each military service has regulations to require members to provide support to their dependents
 - AFI 36-2906, *Personal Financial Responsibility*, paragraph 4.1, states that military members will provide financial support to a spouse or child or any other relative for which the member receives additional allowances for support
 - Military members must comply with state court orders to provide support
 - Commanders may use a pro-rata share equation to calculate the support required for a service member's dependents
 - AFI 36-2906, Figure 1.1, contains the pro-rata share formula for determining the financial support required of service members. The formula uses Non-Locality Basic Allowance for Housing with Dependent Rate (also known as BAH II-WITH)

Table 8.1 Pro-rata Share Formula

$\text{Pro-rata share} = \frac{1}{\text{Total number of supported family members}} \times \text{Applicable Non-Locality Basic Allowance for Housing – with Dependent Rate}$

- Note: the total number of supported family members does **NOT** include the service member
- AFI 36-2906, paragraph 4.1.1, applies to all members regardless of the type of BAH received. However, there are several exceptions outlined in paragraph 4.1.2.

REFERENCES

Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901 *et seq.* (2003)

Uniform Child Custody Jurisdiction and Enforcement Act (citation varies by state)

Uniform Law Commission's Deployed Parents' Custody and Visitation Act (citation varies)

DoDI 1342.19_AFI 36-2908, *Family Care Plans* (24 January 2019)

AFI 36-2906, *Personal Financial Responsibility* (30 July 2018)

AF Form 357, *Family Care Certification* (16 March 2015)

FAMILY MEMBER MISCONDUCT

Installation commanders are often called upon to resolve difficult problems arising from family member misconduct. The installation commander is responsible for maintaining good order and discipline and protecting Air Force and Space Force resources. However, the installation commander may have little authority when it comes to punishing civilians. Nonetheless, there are certain actions available to address family member misconduct.

Commander Responsibilities and Options

- Administrative Actions:

- *Suspend or revoke privileges*
 - Driving suspension may be mandatory in certain circumstances (e.g., drunk driving)
 - Base Exchange (BX)/Commissary
 - Morale, Welfare, and Recreation (MWR) facilities
- *Terminate military family housing*
 - Requires 30-days written notice
 - Department of the Air Force pays for the move, but partial dislocation allowance is not payable
- *Debarment*
 - 18 U.S.C. § 1382 makes it a crime to enter the installation after previously being debarred
 - Debarment should be in writing, setting forth the specific reasons for debarment. Debarment may be indefinite, but set time limits are recommended.
 - Debarment must still provide access to medical treatment if authorized and available

- Criminal Actions:

- Where criminal actions occurring on a military installation will be prosecuted depends upon the jurisdiction of the base
- If the base is under exclusive federal jurisdiction, family members may be prosecuted in federal magistrate court. In most cases, at least one of the attorneys in the legal office serves as a Special Assistant United States Attorney (SAUSA) and handles these prosecutions with the local United States Attorney's Office.
- If the base has concurrent jurisdiction, either federal court or state court may be the proper forum for prosecuting family members. Consult with your servicing staff judge advocate (SJA) for guidance on prosecuting civilians for offenses committed on a military installation.
- If the base has only proprietary jurisdiction, which means that the state retains law enforcement duties, the state has the authority to prosecute family member misconduct (involving only state crimes) occurring on the installation. Any family member misconduct should be referred to the local authorities for prosecution.
- Some installations have established programs for handling juvenile misconduct. Often called Juvenile Correction Boards (JCB), these boards consider cases of misconduct committed by juveniles (unmarried non-military persons under the age of 18 years old) and recommend to the installation commander how to handle the matter. Although participation in the JCB is voluntary, juveniles who choose not to participate in the JCB process may be subject to other actions to include, but not limited to, debarment from the base.

- Early Return of Dependents (ERD) (OCONUS):
 - Table 5-20 of Joint Travel Regulation (JTR) provides for the early return of dependents (ERD) when a command sponsored dependent of a member stationed in foreign country becomes involved in an incident that is any of the following:
 - Embarrassing to the U.S.
 - Prejudicial to the command's order, morale, and discipline
 - Facilitates the conditions in which the dependent's safety can no longer be ensured due to adverse public feeling in the area or due to force protection and antiterrorism considerations
 - Requires the dependent to register as a sex offender under the laws of any jurisdiction
 - Table 5-22 of the JTR specifies the circumstances when Permanent Dependent Travel (PDT) relocation may be authorized

REFERENCES

18 U.S.C. § 1382

Joint Travel Regulations – Uniformed Service Members and DoD Civilian Employees (1 April 2021)

AFI 32-6001, *Family Housing Management* (21 August 2006), including AFI32-6001_AFGM2019-01, 15 October 2019

AFI 36-3026_IP, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (4 August 2017)

AFI 51-206, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (31 August 2018)

ON-BASE FAMILY HOUSING

The Department of the Air Force has both government-owned family housing as well as privatized housing. Congress established the Military House Privatization Initiative (MHPI) in 1996 with the goal to improve the quality of life for service members. The FY 2020 National Defense Authorization Act (NDAA) created the MHPI Tenant Bill of Rights. These 18 rights are codified at 10 United States Code (U.S.C.) § 2890, and military commanders should general be aware of them.

Tenant Bill of Rights

- The goal of the MHPI Tenant Bill of Rights is to ensure safe, quality, and well-maintained living conditions and communities as well as the fair treatment from private partners (privatized housing companies) that operate and maintain privatized housing. These rights include, but are not limited to:
 - The right to reside in a housing unit and a community that meets applicable health and environmental standards
 - The right to reside in a housing unit that has working fixtures, appliances, and utilities, and the right to reside in a community with well-maintained common areas and amenity spaces
 - The right to a written lease with clearly defined rental terms to establish tenancy in a housing unit, including any addendums and regulations imposed by the landlord regarding occupancy of the housing unit and use of the common areas
 - The right to a plain-language briefing before signing a lease, and 30 days after move-in, by the installation housing office on all rights and responsibilities associated with tenancy of the housing unit, including information regarding the existence of any additional fees authorized by the lease, any utilities payments, the procedures for submitting and tracking work orders, the identity of the military tenant advocate, and the dispute resolution process
 - The right to have sufficient time and opportunity to prepare and be present for move-in and move-out inspections, including an opportunity to obtain and complete necessary paperwork
 - The right to report inadequate housing standards or deficits in habitability of the housing unit to the landlord, the chain of command, and housing management office without fear of reprisal or retaliation, including the following actions: (A) unlawful recovery of, or attempt to recover, possession of the housing unit; (B) unlawfully increasing rent, decreasing services or increasing the obligations of a tenant; (C) interference with a tenant's right to privacy; (D) harassment of a tenant; (E) refusal to honor the terms of the lease; or, (F) interference with the career of a tenant
 - The right of access to a military tenant advocate or a military legal assistance attorney through the housing management office of the installation of the department at which the housing unit is located to assist in initiating dispute resolution
 - The right to receive property management services provided by a landlord, which meet or exceed industry standards, and are performed by professionally and appropriately trained, responsive and courteous customer service and maintenance staff
 - The right to have multiple, convenient methods to communicate directly with the landlord's maintenance staff and to receive consistently honest, accurate, straightforward and responsive communications
 - The right to have access to an electronic work order system through which a tenant may request maintenance or repairs of a housing unit and track the progress of the work

- The right to the following: (A) prompt and professional maintenance and repair; (B) to be informed of the required timeframe for maintenance or repairs when a request is submitted; and (C) in the case of maintenance or repairs necessary to ensure habitability of a housing unit, to prompt relocation into suitable lodging or other housing at no cost to the tenant until the (work) is completed
- The right to receive advice from military legal assistance on resolving disputes with the property management company or property manager to include mediation, arbitration and filing claims against a landlord
- The right to have reasonable, advance notice of any entry by a landlord, installation housing staff or members of the chain of command into the housing unit, except in the case of an emergency or abandonment of the housing unit
- The right to not pay non-refundable fees or have application of rent credits arbitrarily held
- The right to expect common documents. Forms and processes for housing units will be the same for all installations (across the DOD) to the maximum extent applicable without violating local, state, and federal regulations.

Termination from Privatized Housing

- Tenancy may be terminated by the privatized housing company if a member/tenant does not abide by the terms of the signed tenant lease stipulations
- Military members and their dependents are entitled to legal assistance from the base legal office regarding issues relating to privatized housing

Termination from Government-Owned Base Housing

- Military personnel may be required to terminate occupancy of family housing when:
 - The conduct or behavior of the member or dependent family member is contrary to accepted standards or is adverse to military discipline
 - The member or dependent family members are responsible for willful, malicious, or negligent abuse or destruction of property
 - The member fails to comply with the Air Force family child care program
- Cases involving early termination must be fully documented and should be retained on file for a minimum of one year
- An involuntary move from military family housing is at government expense. However, partial dislocation allowance may not be payable.
- Commanders are authorized to terminate housing for the above reasons with 30-days written notice to the member (required notice upon PCS/retirement is 40 days). Basic due process requires allowing the member the right to respond (orally or in writing) before the commander makes his/her decision.

REFERENCE

Military Housing Privatization Initiative Tenant Bill of Rights, 10 U.S.C. § 2890

AFI 32-6001, *Family Housing Management* (21 August 2006), including AFI32-6001_AFGM2019-01, 15 October 2019

AFI 32-6007, *Privatized Housing Management* (19 September 2012), including AFI32-6007_AFGM2019-01, 25 July 2019

AIR FORCE CHILD AND YOUTH PROGRAM (CYP)

Installation commanders are required to mandate appropriate facilities, funding, and manpower to operate the child and youth programs (CYPs) on their installation. They must also ensure installation agencies support CYP oversight and technical assistance requirements including actions needed for personnel background checks. The goal of the CYP is to assist Department of Defense (DoD) personnel in balancing duty and family life obligations by providing family services for youth from birth to 18 years of age. These services take the form of child development centers (CDC), family child care (FCC) homes, school age care (SAC), and youth programs.

Eligibility

- Eligibility for CYP services is contingent on the status of the sponsor. Eligible patrons are outlined in AFI 34-114, *Child and Youth Programs*, and AFI 34-101, *Air Force Morale, Welfare, and Recreation (MWR) Programs and Use Eligibility*. Generally, eligible children and youth have sponsors who are:
 - Active duty military and Coast Guard members
 - DoD civilian employees
 - Air National Guard (ANG) or Reserve members on active duty orders or inactive duty training status
 - Surviving spouses, and *loco parentis* guardians of youths that would otherwise be eligible
 - Combat related wounded warriors in an active duty status
 - Gold Star spouses of military members who dies from a combat-related incident
 - DoD contractors with specific contractual eligibility
 - In the case of unmarried, legally separated parents with joint custody or divorced parents with joint custody, children or youth are eligible for child care only when they reside with the eligible sponsor at least 25 percent of the time in a month
- Children and Youth Program services may be available to those who do not qualify for the above categories on a case-by-case and space-available basis
 - Space-available patrons must make way when space is needed for the above listed groups
- Community based fee assistance programs are available to families who do not have access to installation programs. For example, assistance is available through the Child Care Aware of America website at <http://www.naccrra.org/military-families>.

Child Development Programs

- CDC: Provides care to children from six weeks to five years of age
- SAC: Provides care to children and youth from five to 12 years of age
- FCC: Provides care to children and youth from two weeks to 12 years of age. Child care is provided in certified homes located on or off the installation. FCC likewise provides nontraditional child care needs (e.g., nights, weekends, unique child care)
 - All on-installation childcare is subject to regulation by AFI 34-144 and must be certified by the installation MSG commander

- Uncertified, regular (more than 10 hours per week), on-installation childcare will be investigated by the installation FCC Coordinator, accompanied by the Force Support Squadron (FSS) Commander or designee. An unannounced visit will be made to individuals living in government-owned housing or privatized housing. The individual will be provided a written request to complete the certification procedures and cease providing care until they become certified. The Security Forces Squadron (SFS) will be contacted if there are suspected violations of law.

Certification of FCC Homes

- Not issued until the applicant provides evidence required liability insurance
- Valid for no more than 12 months
- Must comply with most restrictive of state, local and/or Department of the Air Force requirements
- Inspected for fire, safety, first aid, liability insurance, and criminal background checks

REFERENCE

DoDI 6060.02, *Child Development Programs (CDPs)* (5 August 2014), incorporating Change 2, 1 September 2020

AFI 34-101, *Air Force Morale, Welfare, and Recreation (MWR) Programs and Use Eligibility* (16 April 2019)

AFI 34-144, *Child and Youth Programs* (2 July 2019)

SUMMARY COURT OFFICER (SCO)

For deceased active duty Department of the Air Force members and other entitled individuals, the Air Force and Space Force collects, safeguards, and promptly disposes of their personal property and personal effects. The installation commander appoints a summary court officer (SCO) to perform these duties in accordance with AFI 34-501, *Mortuary Affairs Program*. For deceased Department of Defense (DoD) civilians, see AFI 36-809, *Civilian Survivor Assistance*.

Definitions

- Personal Effects: Any personal item, organizational clothing, or equipment physically located on or with the remains. Some examples of personal effects include eyeglasses, jewelry, wallets, insignia, and clothing.
- Personal Property: All of the other personal possessions of the decedent. Some examples of personal property include household goods, mail, personal papers, and privately owned vehicles. Personal property does not include real property except for any debts associated with real property.

Prioritized List of Recipients to Receive Personal Property and Personal Effects

- Surviving spouse or legal representative
- Children in order of age. If the recipient is a minor, forward the property as instructed by the minor's surviving parent, guardian, or adopting parent.
- Parents in order of age. If parents are divorced or legally separated and the divorce or legal separation occurred while the deceased was a minor, then the recipient is the custodial parent. In a shared custody arrangement, the custodial parent is the parent who had physical custody at the time the deceased reached the age of majority or entered the military.
- Siblings in order of age
- Next of kin of the deceased. If there are several persons equal in relationship to the deceased, the oldest is the recipient.
- A beneficiary named in the will of the deceased. Where there are several primary beneficiaries, the oldest is the recipient.

Handling and Disposing

- Personal Effects of Deceased Personnel:
 - The Mortuary officer (MO) must inventory and document all personal effects using DD Form 1076, *Record of Personal Effects of Believed to be (BTB) Deceased*. The inventory sheet must accompany the personal effects at all times and a copy should be maintained in the case file. The MO must also clean the personal effects and lock them in a secure area.
 - SCO collects and returns all issued organizational clothing and individual equipment to the member's squadron commander
 - Once the MO ensures the authorized recipient has been officially notified of the death, the MO asks the authorized recipient to provide instructions for disposing of the personal effects
 - MO may only destroy personal effects after receiving written authorization by the authorized recipient and any such destruction must be documented on the DD Form 1076. Mortuary personnel do not have the authority to arbitrarily destroy personal effects.

- Personal Property of Deceased Personnel:

- The SCO:
 - Obtains property disposition instructions and the name, telephone number, and address of the authorized recipient from the MO
 - Corresponds with the authorized recipient at least once a week about progress in resolving property matters and annotates all correspondence in a log of events
 - Alerts organizations on base to make a claim for any unpaid debts. Alternatively, the SCO may accomplish the base-wide notification via email. In all cases, the SCO should coordinate with the installation Public Affairs office for message release.
 - Inventories all property on DD Form 1076
 - Promptly gathers the uniform and clothes needed for burial and gives to the MO
 - Collects organizational clothing and equipment for turn in
 - Removes any questionable items and determines the disposition of this property based on criteria set forth in AFI 34-501, paragraph 13.15.4. Generally speaking, questionable items are those with no intrinsic or sentimental value, unfit to forward to the authorized recipient, or inflammatory items which could cause further grief.
 - Coordinates with the Travel Management Office to arrange shipment and/or storage of household goods and personal property
 - Closes the summary court file
- The servicing legal office provides guidance to the SCO on disposition of personal property and reviews the summary court file for legal sufficiency

For Missing, Detained, and Captured Persons

- The MO secures and holds the property for at least 30 days or until the member's status is changed from missing to detained, captured, or the member returns
- If, after 30 days, (1) the missing member's status is changed to detained or captured, or (2) there is no change in status, the installation commander will appoint a SCO to secure, inventory, and give or ship the property to the authorized recipient
- If the missing member returns, the property is released to the member
- SCO secures, inventories, and disposes of the property to those authorized to receive it in the event of the member's death

REFERENCES

Disposition of Unclaimed Property, 10 U.S.C. § 2575

Disposition of Effects of Deceased Persons by Summary Court-martial, 10 U.S.C. § 9712

DoDD 1300.22, *Mortuary Affairs Policy* (30 October 2015), incorporating Change 1, 8 December 2017

AFI 34-501, *Mortuary Affairs Program* (16 April 2019)

AFI 36-809, *Civilian Survivor Assistance* (20 March 2019)

DAFI 36-3002, *Casualty Services* (4 February 2021)

DD Form 1076, *Record of Personal Effects of Believed to Be Deceased* (August 2015)

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CHAPTER NINE: LEGAL ASSISTANCE

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OVERVIEW OF LEGAL ASSISTANCE PROGRAM

The armed services may, in accordance with 10 U.S.C. § 1044, provide legal assistance to eligible beneficiaries in connection with their personal civil legal affairs. The Air Force and Space Force Legal Assistance Programs are governed by AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs*. The legal assistance program supports and sustains command effectiveness and readiness by making every effort to satisfy the legal assistance needs of eligible persons within the scope of the program and contingent upon available resources and expertise. The legal assistance program gives priority to solving mobilization and deployment related legal issues — that is, a member's legal issues that could negatively affect command readiness

Eligibility for Legal Assistance

- The following individuals are eligible for legal assistance services:
 - Active duty members, including reservists and guardsmen on federal active duty under Title 10 of the U.S. Code, and their dependents who are entitled to an ID card
 - Air Reserve component members performing Active Guard/Reserve (AGR) tours
 - Members of reserve components (not otherwise covered) under a call or order to active duty for more than 30 days. The period of eligibility equals to twice the length of the order to active duty. Dependents entitled to an ID card are eligible during the same time period.
 - Officers of the commissioned corps of the Public Health Service who are on active duty
 - Retirees and their dependents entitled to an ID card. This includes members receiving retired pay as a result of retirement due to permanent disability or placement on the temporary disability retired list.
 - Note: "Gray Area" reservists are not entitled to legal assistance (e.g., those who have retired, but are not yet entitled to retired pay under 10 U.S.C. § 12731)
 - Civilian employees stationed outside of the United States and its territories, and their family members who both reside with them outside of the continental United States (OCONUS) and are entitled to an ID card
 - Reservists and National Guard members not in Title 10 status, but subject to federal mobilization in an inactive status, are eligible for only mobility/deployment related legal assistance
 - DoD civilian employees and contractors deploying to or in a theater of operations for contingencies or emergencies shall be furnished assistance with wills and powers of attorney in accordance with DoDI 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures*
 - DoD civilian employees assigned OCONUS and their dependents
 - Foreign military personnel assigned to the United States under official orders for purposes of combined missions with the United States or for training programs sponsored by the United States. Assistance will be limited to matters involving the interpretation or application of United States domestic law pertinent to the person's relocation and requirement to be present in the United States (e.g., landlord-tenant, consumer affairs, driver's license, customs, tax relief, and similar assistance).
 - Matters relating to the settlement of estates of service members who die on active duty or as a result of an injury or disability that resulted in retirement from active duty; or to the primary next of kin

- Staff Judge Advocates (SJAs) may authorize legal assistance to persons not specifically identified above as an eligible beneficiary (e.g., demobilized Air Reserve Components (ARC) members and Reserve Officers' Training Corps (ROTC) Cadets)
- At Air National Guard (ANG) installations with a legal assistance program, members of the National Guard, spouses of members, and family members entitled to a military identification card are eligible for legal assistance. The ANG member must be in a duty status under Title 10 or Title 32 in order for his/her spouse and family member to receive legal assistance.

Legal Assistance Services Provided

- The following legal topics may be addressed as resources and expertise permit:
 - Wills, living wills, powers of attorney, and notary services
 - Family law, to include adoptions, dependent care issues, child custody, domestic relations, and financial responsibilities
 - Servicemembers Civil Relief Act (SCRA) and Uniformed Services Employment and Reemployment Rights Act (USERRA)
 - Consumer law, to include bankruptcy, consumer fraud, identity theft, illegal lending practices, and vehicle leases
 - Immigration/naturalization law
 - Tax assistance
 - Victims of crime, including domestic violence victims
 - Matters relating to settlement of estates, including tax assistance, to estate representative or survivors if the member dies on active duty or as a result of an injury or disability that resulted in retirement from active duty
 - Landlord-tenant and lease issues, including privatized housing
 - Other issues deemed connected with personal, civil legal affairs by The Judge Advocate General (TJAG), the MAJCOM SJA, the NAF SJA, the base SJA, or the commander
- Referral: Due to the scope and limitations of the program, as well as the particular needs of the client, the legal office may refer clients to other resources, such as a civilian attorney (through the local bar referral service), area defense counsel (ADC), Special Victim's Counsel (SVC), chaplain, equal opportunity (EO) counselor, military personnel flight, family advocacy, the family support center, or available free or "pro bono" legal services

Preventive Law

- Each base will have a preventive law program, with a focus on educating members on preparing for mobilization and deployment, seeking timely legal advice, the consequences of signing legal documents, and maintaining vigilance to identify and avoid legal/financial scams
- Education programs are designed to allow Airmen and Guardians to focus on mission requirements and reduce the time and resources needed to correct legal problems that occur

Matters Specifically Outside the Scope of the Program

- The following are specifically outside the scope of legal assistance:
 - Issues involving personal business or commercial enterprises. Exception: Air Force and Space Force attorneys may provide legal guidance and advice to service members who are business owners if related to the SCRA.

- Criminal issues where the member is suspected or accused of a crime
- Issues related to standards of ethical conduct issues
- Issues related to the Law of War
- Official matters in which the Air Force or Space Force has an interest or is involved in the investigation or final resolution (e.g., reports of survey)
- Legal issues or concerns raised on behalf of third parties, even if the third party is eligible for legal assistance
- Issues involving private organizations
- Representation in a civilian court or administrative proceeding
- Drafting or reviewing for legal sufficiency real estate sales or closing documents, separation agreements, divorce decrees, transfer on death deeds, inter vivos trusts, and other types of pleadings prepared for off-base court proceedings unless the SJA determines an individual attorney within the office has the expertise to do so

Attorney-Client Relationship

- Air Force and Space Force attorneys establish an attorney-client relationship and, as such, any information or documents received from or relating to a client are considered privileged and confidential
 - Privileged information may be released only with the client's express permission, pursuant to a court order, or as otherwise permitted by the Air Force Rules of Professional Responsibility
 - Disclosure may not be lawfully ordered by any superior military authority
 - This confidentiality extends to confirming if a legal assistance appointment did or did not occur
- If a commander is contacted by a legal assistance attorney on behalf of a client, e.g., regarding a member's failure to provide financial support to family members, the commander should understand the attorney is representing the interests of that particular individual client
 - The commander should contact the SJA, who represents the interests of the Air Force or Space Force, for advice concerning the matter

REFERENCES

- 10 U.S.C. § 1044, *Legal Assistance*
- 10 U.S.C. § 12731, *Age and Service Requirements*
- 50 U.S.C. §§ 3901 *et seq.*, *Servicemembers Civil Relief Act*
- DoDI 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures* (24 April 1995)
- AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs* (22 August 2018)
- ANGI 51-504, *Air National Guard Legal Assistance Program* (20 November 2014), certified current 25 February 2019

NOTARIES

Many important documents are required by law to be notarized. Notarization demonstrates that a person with notary authority — that is, a notary public — confirmed the identity of the person signing the document and witnessed the signature. It can also confirm, if required, that the person made an oath as part of executing the document. Notary services are available to eligible personnel, under Title 10 of the U.S. Code, as part of the military legal assistance program.

Eligibility for Notary Service

- Personnel eligible for military notary services are:
 - Members of the armed forces
 - Other persons eligible for legal assistance under 10 U.S.C. § 1044 or other regulations of the DoD, to include AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs*
 - Persons serving with, employed by, or accompanying the armed forces outside the United States, Puerto Rico, Guam, and the Virgin Islands
 - Other persons subject to the Uniform Code of Military Justice (UCMJ) outside the United States

Persons with Notary Authority

- Under 10 U.S.C. § 1044a, state laws, AFI 51-304, and Air National Guard Instruction (ANGI) 51-504, *Air National Guard Legal Assistance Program*, the following individuals have the general powers of a notary public and of a consul of the United States in the performance of all notary acts:
 - All judge advocates, including reserve judge advocates when not in a duty status
 - All civilian attorneys serving as legal assistance attorneys
 - Air National Guard (ANG) judge advocates and paralegals while performing duty under Title 10 or Title 32 or if qualified as a notary public under state law
 - ANG judge advocates and paralegals, even when not in a duty status, have the general powers of a notary public in the performance of all notarial acts
 - ANG commanders may name civilian employees to serve as notaries as part of their official duties provided they qualify under the laws of the state where they will serve
 - Other civilian employees (e.g., paralegals) must qualify as a notary under state laws
 - All civilian paralegals serving at a military legal assistance office if supervised by a military legal assistance counsel. A military legal assistance counsel is a judge advocate or a civilian attorney serving as a legal assistance officer.
 - Enlisted paralegals on active duty or performing inactive duty training
 - Commissioned officers or master sergeant and above stationed at geographically separated units (GSUs) or remote locations where no judge advocate or paralegal notary is assigned, and who have been designated in writing by the GSU's servicing general court-martial convening authority's staff judge advocate (SJA) and received proper training

Special Rules for Certain Military Instruments

- 10 U.S.C. §§ 1044b-d provide for the execution of military powers of attorney, military advance medical directives (commonly referred to as “living wills”), and military testamentary instruments (commonly referred to as “wills”). These documents:
 - Are exempt from any requirement of form, formality, or recording that is required under the laws of a state
 - Military powers of attorney and advance medical directives, but not wills, are also exempt from any state requirements of substance
 - Shall be given the same legal effect as powers of attorney, living wills, and wills prepared and executed in accordance with the laws of the state concerned. Military advance medical directives are not enforceable in states that otherwise do not recognize living wills.
- All other documents, notarized under the authority of 10 U.S.C. § 1044a, are subject to state law as to form, substance, formality or recording

Notary Procedures and Guidelines

- Personnel signing documents as a notary public under 10 U.S.C. § 1044a must:
 - Specify date, location, title, and office
 - Use an inked stamp or a raised seal that contains a cite to 10 U.S.C. § 1044a and the identifier “U.S. Armed Forces,” “U.S. Air Force,” or “U.S. Space Force.” In addition, it must contain the identifier “Judge Advocate.”
 - Verify the identity of each person whose signature is to be notarized, with a military ID card
 - Administer an oath, in accordance with the rules of AFI 51-304 and Title 10, for any “sworn” document
 - Maintain a personal notary log as proof of each notarial act performed, to include each signer’s name and signature, type of document, date, and location. These logs will be maintained according to AFI 51-304 and/or applicable state law.
- Personnel signing documents as a notary under 10 U.S.C. § 1044a must **NOT**:
 - Notarize incomplete documents, to include accepting previously signed signatures as genuine on the word of a third party
 - Accept any fee for the performance of a notarial act
 - Certify a document as a “true and accurate copy” unless they are the custodian of the original. To certify a document as a “true and accurate copy” is to verify the document’s authenticity and carries specific legal effect that only the creator or the custodian of the original document can provide. However, the client’s needs can usually be met with a notarized signed statement from the member stating that the document is true and accurate. The notary is merely notarizing the signed attestation of the client and thus not certifying the document.

REFERENCES

10 U.S.C. §§ 1044, 1044a-d

AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs* (22 August 2018)

ANGI 51-504, *Air National Guard Legal Assistance Program* (20 November 2014), certified current 25 February 2019

WILLS AND POWERS OF ATTORNEY

Wills and powers of attorney (POAs) are useful legal documents for members to manage their personal and financial affairs. A will is an instrument by which a person, known as a “testator,” provides for the disposition of his or her property after death. A POA is a document by which a person (the principal) authorizes another person (the agent) to conduct specific acts on their behalf. Commanders should emphasize the importance of preparing wills and POAs, especially prior to deployment.

Wills

- Though it must be a free and voluntary act by the service member, **ALL** commanders should encourage their Airmen and Guardians to make a will
- Even if a testator has little property, settling affairs with a will is often easier for the family. For instance, some states have “small estate” laws that allow a spouse to probate a valid will without a lawyer and with minimal expense, but the small estate value threshold differs among states.
- A will is particularly important for the following:
 - Personnel with minor children
 - The court will generally follow the designation of a guardian for the children in a will, which often alleviates confusion and family disputes about the parents’ intention concerning the care of their child
 - Personnel with special needs children may require advanced estate planning advice to ensure the children are properly cared for and that any inheritance received does not disqualify or remove the special needs child from government programs
 - Personnel with business interests or high-value estates. On a case-by-case basis, it may be advisable for members with business interests or substantial estates to seek outside counsel for a more comprehensive estate plan.
 - Personnel in a subsequent marriage or with blended families where either spouse comes to the marriage with children from a prior relationship
 - Personnel who are divorced or widowed
- State law dictates the requirements for making a valid will. These laws vary widely from state to state. For this reason, members should seek the services of the base legal office and avoid “do-it-yourself” will services. The base legal office is prohibited from executing “fill-in-the-blank” wills from commercial, outside providers.
- If a service member dies without a will, his or her property will be distributed according to state law
 - Under most state laws, property will only pass to blood relatives and not to in-laws or stepchildren
 - Property is generally transferred in the following order of precedence: surviving spouse, children, parents, and then siblings
 - Some states divide property between the surviving spouse and children, and some states allow minor children to receive property
 - Normally, a state will only receive the property if there are no surviving relatives
 - Members, rather than state law, can determine what happens to their estate by creating a valid will

- A will remains in effect until changed or revoked by the testator
- Certain life events may impact provisions in a testator's will, such that it would be advisable to create a new will. A testator should review his will periodically and consider updating it, especially with these changed circumstances:
 - The birth or death of any person affected by the will
 - The marriage or divorce of the testator
 - A substantial change in the testator's estate

Powers of Attorney

- A POA is a document that allows someone else to act as your legal agent, or "attorney-in-fact." These documents are available at all base legal offices and can be particularly important for mobilizing personnel.
- Third parties (e.g., banks and businesses) may be unwilling to accept the authority granted within a POA. Therefore, to minimize the risk of rejection, it is usually best to tailor the POA to the given situation and the specific act required of the agent.
- In order to perform the requested acts, the attorney-in-fact will hold the original, executed POA. As the granting of a POA to an agent inherently creates some risk of abuse, personnel should carefully choose a trustworthy agent.
- To revoke a POA before its expiration, personnel may retrieve the original document and destroy it, or execute a revocation of a POA and give a copy to any person that might deal with the person who has the original POA
- There are several types of POAs, as described below:
 - General POA:
 - Gives comprehensive authority over virtually all legal and some non-legal affairs. Basically, the attorney-in-fact can do any and all things the grantor could do.
 - Because the authority granted is so expansive, this type of POA should only be used if a special POA will not suffice and if the agent is *completely trustworthy*
 - A person with a general POA has the ability to cause serious financial or legal problems for the grantor because of the vast and comprehensive authority given
 - Many banks and realtors will not accept a general POA for the purchase or sale of real estate and instead require a special POA containing the legal description of the property and the actions authorized
 - Special POA:
 - Grants limited authority to accomplish specific transactions, such as buying/selling real estate or a car, usually for a limited time period
 - Durable POA:
 - Takes effect upon, or is still effective notwithstanding, a person's medical incapacity and designates another person to make decisions on behalf of the incapacitated person
 - A general or special POA may be made "durable" with appropriate language
 - Allows the attorney-in-fact to make decisions and manage the affairs for the incapacitated person for the duration of the incapacity

- Generally eliminates the need for a court to establish a guardian and conservator for the incapacitated person
- The authority may extend to decisions for medical purposes, including a decision regarding terminating or limiting medical care in appropriate cases. For health care decisions, it is best to grant authority through a separate Healthcare Power of Attorney, also known as an Advance Medical Directive.

Military POAs and Wills

- 10 U.S.C. §§ 1044b-d respectively, provide for the execution of military POAs, military advance medical directives, known as “living wills,” and military testamentary instruments or “wills.” These documents, though executed by the military, will be given the same legal effect as documents prepared and executed in accordance with the laws of the state concerned.
 - These military documents are exempt from any requirement of form, formality, or recording that is required under the laws of a state
 - Military living wills are not enforceable in states that do not recognize living wills

REFERENCES

10 U.S.C. §§ 1044b-d

DoDD 1350.4, *Legal Assistance Matters* (28 April 2001), incorporating Change 1, 13 June 2001, certified current 1 December 2003

AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs* (22 August 2018)

TAX ASSISTANCE PROGRAM

Air Force and Space Force Tax Assistance programs are command programs designed to provide free tax assistance and filing services to eligible beneficiaries. When resourced and managed properly, an active, aggressive, well-publicized program can enhance morale and help beneficiaries address some of the unique income tax aspects associated with a military lifestyle. The size and scope of each program may vary from base to base, depending on mission requirements, geographical location, availability of resources, and the unique needs of the local community.

Scope

- The installation commander, in consultation with the staff judge advocate (SJA), has the flexibility to decide, based on the needs of the installation and available resources, which of the following program(s) is best for eligible beneficiaries. If circumstances warrant, the commander may also elect to not have an installation tax program.
 - Traditional On-Base Tax Assistance Program:
 - These “full service” programs are supervised by the SJA and staffed by legal office personnel, as well as base volunteers, under the Internal Revenue Service (IRS) Volunteer Income Tax Assistance (VITA) program
 - Tax assistance personnel are trained by and use the IRS’ electronic filing resources
 - Tax assistance programs are separate and distinct from the legal assistance program; attorney-client privilege does not apply to the preparation of income tax returns
 - Self-Service Kiosks:
 - If resources are limited, a smaller team of volunteers can be trained to assist personnel in filing their taxes with the Military One Source website at available kiosks
 - Referrals to Other Free Tax Preparation Services:
 - Without endorsing any non-federal service or entity, the base legal office will make available a listing of off-base and electronic tax assistance options, such as the IRS Free File Alliance

Decisional Factors

- When deciding which program to establish, commanders and their SJAs should consider factors that may impact the availability and sustainability of the program such as:
 - Competing mission requirements
 - Availability of local volunteer support
 - Availability of IRS software and training support
 - The negative impacts to program continuity (e.g., loss of future IRS support, loss of future volunteer support, loss of institutional knowledge) should the installation want to continue the program at a later date
 - Budgetary constraints
 - Impact on base morale
 - Demand for tax services
 - Availability of free online filing services and other nearby VITA programs accessible for all beneficiaries

- Availability of other professional filing services near the installation
- Additionally, commanders and SJAs for commands serving in a host or supporting role-on joint bases are advised to review support agreements for any provisions regarding the tax program

Eligible Beneficiaries

- Eligible beneficiaries are active duty service members and their dependents and retirees and their dependents. SJAs can further limit eligible beneficiaries for the tax program (e.g., personnel in the grade of E-6 and below). Lastly, SJAs should authorize tax services for victims of crimes, consistent with the availability of resources.
- SJAs may also extend services, as resources allow, to federal civilian employees. Federal civilian employees must adhere to applicable rules concerning use and allotting of their time when they seek tax assistance services.

REFERENCES

10 U.S.C. § 1044, *Legal Assistance*

AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs* (22 August 2018)

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CHAPTER TEN: CIVIL LAW RIGHTS AND PROTECTIONS OF MILITARY PERSONNEL

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EQUAL OPPORTUNITY (EO) AND TREATMENT

The federal government has enacted many statutes to ensure equal opportunity (EO). Almost all of these statutes apply exclusively to civilian employees as victims and do not cover military members as victims. However, the Department of Defense (DoD), Air Force, and Space Force anti-discriminatory policies protect both military members and civilian employees through a bifurcated system. The primary difference in this bifurcated system is that military members are limited to presenting their complaints to forums within the executive department. Civilian employees, on the other hand, have the right to file a complaint before an independent federal court after exhausting administrative remedies within the executive department.

- The following are key EO statutes:
 - Title VII of the Civil Rights Act of 1964
 - Equal Employment Opportunity Act of 1972
 - The Rehabilitation Act of 1973
 - The 1978 Amendments to the Age Discrimination in Employment Act
 - The Civil Rights Act of 1991

Air Force and Space Force Policy

- Air Force and Space Force policy is to conduct its affairs free from unlawful discrimination and sexual harassment, and to provide equal opportunity and treatment irrespective of race, color, religion, sex (to include pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, genetic information, or prior equal employment opportunity (EEO) activity (reprisal)
- Commanders are required to immediately conduct an investigation when an employee makes a report of discrimination based on sexual harassment. This applies equally to both military members and civilians.
- Commanders must take appropriate administrative or disciplinary action to eliminate or neutralize discrimination and its effects

Department of the Air Force Equal Opportunity Program

- Chapter 4 of AFI 36-2710, *Equal Opportunity Program*, sets out the Air Force Military Equal Opportunity program for processing both informal and formal discrimination complaints made by military members
 - Military members are limited to presenting administrative complaints of discrimination, which, when substantiated, are addressed through command action. They cannot bring a civil action against the government for employment discrimination and they cannot receive any kind of monetary damages normally available for civilians in the same situation.
 - Air Force and Space Force policy is clear: “Zero tolerance” for any kind of unlawful discrimination against military members on the basis of race, color, religion, sex (to include pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, genetic information, or reprisal
 - Discrimination can be generally defined as any action that unlawfully or unjustly results in unequal treatment on the basis of race, color, religion, national origin, sex, age, disability, genetic information, and the distinctions are not supported by legal or rational considerations

- Such discrimination includes, but is not limited to:
 - Insults, printed materials, visual materials, signs, symbols, posters, or insignias that infer negative statements pertaining to protected status (e.g., race, religion)
 - Personal discrimination to bar or deprive a person of a right or benefit
 - Sexual harassment
 - Institutional practices that deprive a person or group of a right or benefit
- The military equal opportunity (MEO) office is the office of primary responsibility (OPR) for the Air Force and Space Force EO programs and handles almost all informal and formal complaints of discrimination brought by military members

Unit Commander's Responsibilities

- Inform unit members of the right to file EO complaints without fear of reprisal
- Post the installation commander and Secretary of the Air Force (SecAF)'s policy memorandums on unlawful discrimination and harassment within the unit. Endorse and communicate the same through commander's calls/briefings.
- Take appropriate disciplinary and corrective action when unlawful discrimination or harassment occurs or reprisal is substantiated
- Ensure every effort is made to protect the complainant's identity when a formal MEO complaint is filed
- At a minimum, provide the MEO office the demographics of participants and action taken on all EO allegations investigated within the unit
- Investigate allegations of unlawful discrimination or sexual harassment when the complainant has elected not to file with the MEO office
 - Designate an EO practitioner to serve as a subject matter expert (SME) for all Commander Directed Investigations (CDIs) conducted
- Take action to end unlawful discrimination or sexual harassment when a formal MEO complaint/incident is substantiated
- Enforce EO policy in a fair, impartial, and prompt manner
- Ensure rating and evaluating officials evaluate compliance with EO directives and document repeated or serious violations
- Inform alleged offender(s) they are the subject of a formal MEO complaint, ensure they are cautioned against taking reprisal or other retaliatory actions, ensure they are briefed on the outcome of the MEO case when it is closed, and advise on their right to appeal
- Complete a Defense Equal Opportunity Climate Survey (DEOCS) within 120 calendar days of assumption of command and every 12 months after the completion of previous assessments for units of 50 or more personnel. Commanders must also complete an Organizational Climate Assessment annually.
 - Air National Guard (ANG) commanders must complete the DEOCS within 180 calendar days upon assumption of command and every 24 months thereafter

Complaint Processing Procedures

- MEO serves as the focal point for complaints of discrimination brought by military members, but the nature of the complaint will determine which agency conducts the investigation
 - MEO complaints against senior officials, consisting of officers in the grade of O-7 select and above, ANG colonels with a certificate of eligibility, and members of the senior executive service (SES), must be immediately referred to SAF/IGS
 - EO must notify the installation commander and local Inspector General (IG) when there is an MEO complaint against an officer in the grade of O-6, an officer who has been selected for O-6, or a civil service employee in the grade of GS-15, and the installation commander must notify MAJCOM/IGQ and SAF/IGQ of such complaints
- Complaints involving criminal activity such as assault, rape, or child abuse must be immediately referred to the Air Force Office of Special Investigations (AFOSI) or Security Forces Squadron. In cases of sexual assault, the EO specialist will also notify the Sexual Assault Response Coordinator (SARC).
- Complainants may elect to use informal complaint process, which may include alternate dispute resolution (ADR). Facilitation of ADR for ANG members will be completed in accordance with Chief National Guard Bureau Instruction (CNGBI) 0402.01, *National Guard Alternative Dispute Resolution*
 - When the MEO office investigates a complaint of discrimination, it is called a complaint clarification and the allegation is documented on AF Form 1587, *Military Equal Opportunity Formal Complaint Summary* or AF Form 1587-1, *Military Equal Opportunity Informal Complaint Summary*
 - Base-level MEO personnel conduct clarifications of formal complaints
 - The purpose of clarification is to determine whether a formal complaint is supported by a preponderance of the credible evidence (more likely than not). Credible evidence is defined as evidence that is believable, confirmed, and corroborated.
 - If a clarification results in a determination that an alleged violation has occurred, the case **MUST** be forwarded through the offender's servicing staff judge advocate (SJA) and the complainant's commander for appropriate action
 - Both the complainant and the subject of a formal EO complaint may appeal the findings upon completion of complaint clarification
 - All appeals must be in writing
 - There is no right to a personal hearing
 - Commanders are not required to withhold command action pending an appeal
 - Installation commanders, MAJCOM/CVs, and SAF/MRB are authorized to decide appeals of formal complaints of discrimination in MEO cases
 - First level of appeal is to the lowest level of command authorized to decide the appeal, usually the installation commander
 - The appellate authorities may sustain or overrule any finding rendered below or remand the matter for further fact finding
 - SAF/MRB is the final review and appeal level for findings of formal complaints of unlawful discrimination

- Findings rendered pursuant to command action under the UCMJ are not subject to appeal through MEO channels

Air Force Reserve and Air National Guard Considerations

- Complaints filed by Air Force Reserve (AFR) members while on Regular Air Force (RegAF) status (including training and work under 10 U.S.C.) and Active Guard/Reserve members will follow the procedures outlined in AFI 36-2710. The provisions of AFI 36-2710 likewise apply to ANG personnel serving under Title 32 orders to include drill status guardsmen (DSGs).
 - Allegations of unlawful discrimination and harassment by Air Reserve Technicians (ARTs) and Active Guard Reserve (AGR) members under Title 32 state regulations must be forwarded by the installation EO office to the civilian EO complaint process regardless of the status of the alleged offender
 - Air Reserve personnel may file a complaint regarding an alleged action that occurred while they were on federal RegAF status even after release from RegAF
 - Complaints must be filed within 180 days or 6 regularly scheduled drills (RSDs) of the alleged action. Commanders may waive this time limit for good cause.
- The ANG Readiness Center EO Office will process complaints for 10 U.S.C. RegAF status members assigned to the ANG Readiness Center, National Guard Bureau (NGB), or any Geographically Separated Unit (GSU) aligned with the ANG Readiness Center
 - ANG personnel on 10 U.S.C. RegAF status assigned to a RegAF installation who are not assigned to the ANG Readiness Center may file their complaint with the installation EO office where the alleged offense occurred

Performance Evaluation Reports and Assignments

- Rating and reviewing officials **MUST** consider membership in groups espousing supremacist causes or advocating unlawful discrimination in evaluating and assigning military members
- While mere membership in such groups is not prohibited, members who join groups espousing supremacist causes or advocating unlawful discrimination may not be suited to hold supervisory or other responsible positions if their personal views would be in conflict with Equal Opportunity and Treatment Program guidelines they are required to support
- Rating and reviewing officials must document serious or repeated deviations from DoD and Air Force or Space Force directives prohibiting discrimination

Reprisal/Whistleblower

- Air Force and Space Force members are protected from reprisal for making, preparing, or attempting to make, a complaint of unlawful discrimination or sexual harassment to EO personnel, an IG or a member of the IG's investigative staff, members of Congress or a member of their staff, DoD law enforcement organizations, personnel assigned to DoD audit, investigation, law enforcement, safety, sexual assault and response designees, and family advocacy organizations, or any other person or organization in the member's chain of command designated pursuant to AFI 90-301 or other established administrative procedures to receive such communications
- Reprisal complaints are referred by EO to the installation IG

REFERENCES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

Equal Employment Opportunity Act of 1972, Pub. L. 92-261, as amended 42 U.S.C. §§ 2000e *et seq.*; 5 U.S.C. § 5108

The Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*

1978 Amendments to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*

The Civil Rights Act of 1991, Pub. L. 102-166, as amended 42 U.S.C. § 2000e

AFI 36-2710, *Equal Opportunity Program* (18 June 2020), including AFI36-2710_AFGM2020-01, 9 September 2020

AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018), incorporating Change 1, 30 September 2020

AFPD 36-27, *Equal Opportunity (EO)* (18 March 2019)

AF Form 1587, *Military Equal Opportunity Formal Complaint Summary* (30 August 2010)

AF Form 1587-1, *Military Equal Opportunity Informal Complaint Summary* (23 August 2010)

CNGBI 0402.01, *National Guard Alternative Dispute Resolution* (24 July 2015)

THE INSPECTOR GENERAL (IG) COMPLAINTS RESOLUTION PROCESS

The inspector general (IG) is the “eyes and ears” of the commander. The IG complaints resolution program is a leadership tool to resolve problems affecting the Air Force or Space Force mission promptly and objectively.

- The IG will encourage complainants to try to resolve their problem(s) at the lowest level first — this usually means the chain of command
- The IG has authority to process a variety of complaints related to violations of law, policy, procedures or regulations, abuse of authority, and the likes
- **ONLY** the IG has the authority to process certain types of allegations for military members: reprisal and restriction. If there is no evidence of reprisal and/or restriction, the IG will analyze for abuse of authority.
- The IG **MAY NOT** be used for:
 - Matters normally addressed through other channels unless there is evidence those channels mishandled the matter or process
 - Matters listed in AFI 90-301, *Inspector General Complaints Resolution*, Table 3.7 (e.g., civilian reprisal complaints, Article 138, UCMJ, correction of military records, etc.)

IG Investigations

- IG investigations are distinct from other investigations, such as commander directed investigations (CDIs)
- An investigating officer (IO) investigates pursuant to AFI 90-301 when properly authorized, in writing, by the appropriate appointing authority
 - Air Force Reserve and Air National Guard (ANG) IGs may be appointed to conduct CDIs at installations other than their own
- A complaint analysis may result in a referral, including referral to a commander to consider a CDI, a dismissal, or a recommendation to investigate
- The standard of proof to substantiate an allegation during an IG investigation is a preponderance of the evidence (meaning more likely than not that the events occurred)

Reprisal (“Whistleblower” Protection) Complaints

- Reprisal is a violation of federal law, 10 U.S.C. § 1034, and may result in disciplinary action under the UCMJ, Articles 92 or 13 2, or applicable civilian directives or instructions
- Reprisal occurs when a responsible management official (RMO) takes or threatens to take an unfavorable personnel action or withholds or threatens to withhold a favorable personnel action on a military member for making or preparing, or being perceived as making or preparing to make, a protected communication
 - RMOs include three categories: (1) those who influenced/recommended the action; (2) those who took the action; and (3) those who approved/reviewed/endorsed the action
 - Personnel actions include actions that affect **OR** have the potential to affect a military member’s current position or career (e.g., promotion, disciplinary/corrective action, reassignment, performance report, a significant change in duties not commensurate with the member’s grade)
 - There are three types of protected communications:
 - Any lawful communication to a member of Congress or an IG

- An unlawful communication is a communication that itself constitutes misconduct, a violation of the UCMJ, Article 92, or a violation of other criminal statute (e.g., knowingly false statements, unauthorized disclosures of information, threatening statements)
- A communication of information reasonably believed to be evidence a violation of law or regulation when made to any of the following (list is not all-inclusive):
 - A member of Congress or a member of their staff; IG or member of the IG's staff; personnel assigned to DoD audit, inspection, investigation, law enforcement, equal opportunity (EO), safety, sexual assault prevention and response designees, or family advocacy organizations; any person in the member's chain of command; Chief Master Sergeant of the Air Force, command chiefs, group/squadron superintendents, or first sergeants; courts-martial proceeding
- Testifying, or participating or assisting in an investigation/proceeding under the above categories, or filing, causing to be filed, participating or assisting in a reprisal and/or restriction action
- *Examples of Protected Communications:* A major tells his commander about what the major reasonably thinks is a threat to flight safety. A senior airman tells her civilian director about what the senior airman reasonably believes to be sexual harassment by her immediate supervisor against an airman basic.
- If the IO determines reprisal did not occur, the IO must conduct an analysis to determine if an abuse of authority occurred
 - Abuse of authority is an arbitrary and capricious exercise of power that adversely affects any person **OR** results in personal gain or advantage to the abuser
 - "Arbitrary and capricious" is defined as the absence of a rational connection between the facts found and the choice made, constituting a clear error of judgment
- All reprisal investigations undergo IG (and potentially legal) reviews at the MAJCOM (or Joint Force Headquarters), Secretary of the Air Force (SecAF), and DoD levels. All cases must have a legal review before the Report of Investigation (ROI) is approved by the appointing authority.
- DoD IG renders final review/approval

Restriction Complaints

- 10 U.S.C. § 1034 and AFI 90-301 also state that no person may restrict a military member from communicating with a member of Congress or an IG as long as the communication is lawful
 - An unlawful communication is a communication that itself constitutes misconduct, a violation of the UCMJ, or a violation of other applicable criminal statutes (e.g., knowingly false statements, unauthorized disclosure of information, threatening statements)
 - Example of restriction: Commander says, "You will NOT go to the IG under any circumstances without coming to me first"
- Restriction is a violation of federal law, 10 U.S.C. § 1034, and may result in disciplinary action under the UCMJ (e.g., violation of Article 92 for not following the applicable Air Force Instruction) or applicable civilian directives or instructions
- If the IO determines restriction did not occur, the IO must conduct an analysis to determine if an abuse of authority occurred

- All restriction investigations undergo IG (and potentially legal) reviews at the major command (or Joint Force Headquarters), SecAF, and DoD levels. All cases must have a legal review before the ROI is approved by the appointing authority.
- DoD IG renders final review/approval

Commander Notification Requirements for Investigations Involving Officers

- IGs at all levels must collect, document, and notify SAF/IG of investigations opened by commanders (CDIs) on **ANY officer** (Second Lieutenant through Colonel) and the issuance of stand-alone adverse actions such as Letters of Counseling (LOCs), Letters of Admonishment (LOAs), and Letters of Reprimand (LORs), or nonjudicial punishments (NJPs) to field grade officers. Installation IGs collect CDIs at the base level, MAJCOM IGs collect CDIs at the MAJCOM level, etc.
 - AFI 90-301, Table 7.1, highlights other investigations and the documents required by SAF/IGQ in order for the IG to close a case involving adverse information
- Commanders, directors and civilian leaders will:
 - Notify the local IG at the start of **ANY investigation** when **ANY officer** (or GS-15 or equivalent) is named as a subject
 - Notify the local IG at the conclusion of **ANY investigation** when **ANY officer** (or GS-15 or equivalent) was named as a subject, **whether the allegations are substantiated or not**
 - Notify the local IG when a **field grade officer** (or GS-15 or equivalent) is administered adverse command action such as LOCs, LOAs, LORs, or NJPs for any reason, **with or without an investigation**
- Commanders and civilians leading an organization designated as a unit in accordance with AFI 38-101, *Manpower and Organization*, at all levels, including joint commands, will immediately notify SAF/IGS of any allegations (criminal, administrative, or otherwise), any adverse information, or any potentially adverse information involving senior officials and provide an information copy to the servicing wing IG office

Special Processing Requirements

- Reprisal and restriction complaints have unique reporting requirements as set forth in AFI 90-301 and only the IG may investigate such allegations
- Only SAF/IGS (unless otherwise specified in AFI 90-301) will conduct investigations into non-criminal allegations against senior officials, including complaints alleging violations of Military Equal Opportunity (MEO) policy by a senior official. However, SAF/IGS does not investigate civilian EO/sexual harassment allegations against senior officials. Those matters will be worked within appropriate EO channels.
 - A senior official is any active duty, retired, Reserve, or National Guard military officer in grades O-7 and above, and any officer selected for promotion to O-7 whose name is on the O-7 promotion board report forwarded to the Military Department Secretary (including ANG colonels selected by a General Officer Federal Recognition Board for a Certificate of Eligibility (COE)); any current or former member of the Senior Executive Service (SES); any current or former DoD civilian employee whose position is deemed equivalent to that of a member of the SES (e.g., Defense Intelligence SES, Senior Level employee, and nonappropriated fund senior executive); and any current or former Presidential appointee

Confidentiality

- Communications made to the IG are **NOT** privileged or confidential
- However, disclosure of these communications, and the identity of the communicant, will be strictly limited to an official need-to-know

Bottom Line

- The potential for an IG complaint should never dissuade a commander from taking timely and appropriate corrective and preventive actions for legitimate reasons
- Commanders should coordinate with the staff judge advocates for effective legal guidance on these issues

REFERENCES

Prohibited Personnel Practices, 5 U.S.C. § 2302

Protected Communications: Prohibition of Retaliatory Personnel Actions, 10 U.S.C. § 1034

Employees of Nonappropriated Fund Instrumentalities: Reprisals, 10 U.S.C. § 1587

Contractor Employees: Protection from Reprisal for Disclosure of Certain Information, 10 U.S.C. § 2409

DoDD 7050.06, *Military Whistleblower Protection* (17 April 2015)

DoD Inspector General, *Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints* (18 April 2017)

AFI 38-101, *Manpower and Organization* (29 August 2019)

AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018), incorporating Change 1, 30 September 2020

DAFPD 90-3, *Inspector General* (3 February 2021)

SAF/IGQ *Inspector General Guide for Investigating Officers* (June 2016)

SAF/IGQ *Commander Directed Investigation (CDI) Guide* (February 2016)

SAF/IG website: <http://www.af.mil/InspectorGeneralComplaints.aspx>

National Guard IG website:

<https://www.nationalguard.mil/Leadership/Joint-Staff/Personal-Staff/Inspector-General/>

PROHIBITION ON SEXUAL HARASSMENT

- The Air Force and Space Force define sexual harassment as a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
 - Submission of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career
 - Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person
 - Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment
- Workplace conduct may be actionable as "hostile work environment" harassment even if it does not result in concrete psychological harm to the victim; rather, it need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive. "Workplace" is an expansive term in the military context and may include conduct on or off duty, 24 hours a day.
- Any person in a supervisory or command position who uses or condones any form of sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment
- Any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature in the workplace is also engaging in sexual harassment
- Any form of unwelcome sexual advance against employees of either gender may constitute unlawful sexual harassment
- Allegations of sexual harassment involving members of the Air National Guard (ANG) while in a duty status, either as a victim or alleged perpetrator, should be immediately reported to the staff judge advocate (SJA) of the member's ANG unit as soon as possible to allow for inquiry and investigation into any potential state law violations, jurisdiction issues, and/or the need for victim assistance

Types of Sexual Harassment

- Judicial decisions have recognized two basic kinds of sexual harassment, both of which are reflected in the Air Force and Space Force's definition:
 - *Quid pro quo* (meaning "this for that")
 - Hostile work environment

Quid Pro Quo Sexual Harassment

- Sexual harassment occurs when an employee suffers or is threatened with some kind of employment injury for refusing to grant sexual favors, or is promised some sort of tangible job benefit in exchange for sexual favors
 - Generally, it involves a supervisor/subordinate relationship where the victim is told to submit to sexual requests or be fired, demoted, or denied a promotion, an award, training opportunity, objective appraisal, etc.
 - A single incident may be enough to qualify as *quid pro quo* sexual harassment

- A threat to take action that changes a victim's employment situation in exchange for sexual favors without an actual job benefit or detriment is sufficient to constitute *quid pro quo* sexual harassment under Air Force and Space Force regulations

Hostile Work Environment Sexual Harassment

- A hostile work environment is created when a supervisor, co-worker, or someone else with whom the victim comes in contact with on the job creates an abusive work environment or interferes with the employee's work performance through words, actions, or conduct that is perceived as sexual in nature
 - Some examples include:
 - Discussing sexual activities
 - Unnecessary touching
 - Commenting on physical attributes
 - Displaying sexually suggestive pictures or pornography
 - Using demeaning or inappropriate terms, such as "babe"
 - Using unseemly or profane gestures
 - Granting job favors to those who participate in consensual sexual activity
 - Using sexually crude, profane, or offensive language
 - A single act, if severe enough, may support a cause of action for hostile work environment sexual harassment
 - The nature, severity, frequency, and duration of the conduct are some factors the courts consider when evaluating whether certain conduct constitutes sexual harassment
 - How severe or pervasive the harassment must be to constitute sexual harassment depends upon the specific facts
 - Conduct that constitutes harassment in one situation may not in another; however, the commander who demands professional, civil conduct from members of the organization will prevent most of the problems that arise in this area
 - An isolated epithet does not usually support a cause of action for hostile work environment discrimination
 - Commanders are not restricted from taking disciplinary action based upon a single incident. Commanders must act to stop sexual harassment no matter how minor the conduct at issue.
 - Because the legal boundaries involved in hostile work environment sexual harassment are unclear, supervisors and subordinates alike should avoid **any** sexual conduct in the workplace or any behavior that is in any way demeaning to members of the opposite or same sex
 - All complaints, regardless of whether they appear to meet the legal test of hostile work environment sexual harassment, should be quickly investigated and appropriate action taken to stop offensive conduct
 - Hostile work environment sexual harassment is the most difficult type to recognize, and the particular facts of each situation determine whether offensive conduct has crossed the line from simply inappropriate behavior to sexual harassment

- Under Title VII of the Civil Rights Act of 1964, civilian victims may sue the Air Force or Space Force for monetary damages for sexual harassment in either form
 - An employer (e.g., the Air Force or Space Force) will almost always have no defense in a case of sexual harassment if the facts show conduct that resulted in an actual tangible employment action (firing, demotion, etc.)
 - Provided no tangible employment action occurred, an employer (e.g., the Air Force or Space Force) may be able to establish a defense to either *limit* or *avoid* liability if the employer has a formal, published policy against sexual harassment, provides training to its employees and supervisors about sexual harassment (and how to stop it), has a grievance and complaint system in place, and takes prompt effective corrective action to remedy a complaint of sexual harassment
- Command attention to sexual harassment must include the following actions:
 - Publish the Air Force and Space Force's zero tolerance policy on sexual harassment
 - Ensure that avenues of communication and complaint for civilian employees and military members are well publicized throughout the unit
 - Provide appropriate training on sexual harassment
 - Act quickly to investigate all complaints of sexual harassment in a fair and impartial manner
 - Seek advice from the equal opportunity (EO) office, the staff judge advocate (SJA), and the civilian personnel office (CPO), as appropriate, before taking action against offenders

Commander's Inquiry – Military or Civilian Complainant

- A complainant may elect the commander's inquiry and/or the military equal employment opportunity (MEO) process for military complainants and/or the equal employment opportunity (EEO) process for civilian complainants
- The process is dual-tracked in that the commander's inquiry, if elected by the complainant, is conducted even if the MEO/EEO process has not been completed
- When the commander receives a complaint, 10 U.S.C. § 1561 requires several actions (commanders should consult the local SJA office for assistance). **Within 72 hours** after receipt of the complaint, the commander must:
 - Forward the complaint or a detailed description of the allegation to the general court-martial convening authority (GCMCA)
 - Begin the investigation
 - Advise the complainant of the beginning of the investigation and provide victim support resources available, on and off-base, and any appeal rights
- The commander is responsible for ensuring the investigation is completed no later than 14 days after it was commenced
- The commander shall also submit a report on the progress made in completing the investigation to the GCMCA within 20 days after the investigation began and every 14 days thereafter until the investigation is completed. Upon completion of the investigation, the commander shall submit a final report on the results of the investigation, including any action taken as a result of the investigation.
- The complainant is entitled to notification of the completion of the investigation along with a copy of the final investigative report. The commander shall also notify the complainant of any appeal rights.

- The commander must submit the report of investigation to the local SJA office for review of legal sufficiency

Complaint Processing – Military Complainant

- The EO office is the office of primary responsibility (OPR) for the Air Force and Space Force EO programs and has primary responsibility for the maintenance of the program and for handling complaints of sexual harassment
 - If a complaint (formal or informal) is filed with the EO office, it will be handled by the EO officer and the alleged occurrence of harassment will be called an EO incident
 - Generally, a formal complaint filed by a military member will generate an investigation by EO personnel called a clarification
 - The clarification is designed to determine the facts and cause of the EO incident, assess the severity of the incident and the effect on morale and good order and discipline, and develop recommendations concerning the classification of the incident and appropriate corrective action
 - A clarification will include witness interviews, taking statements, reviewing records and documents, and will ultimately conclude with a report by an investigating officer
 - The standard of proof used in a clarification is a preponderance of the credible evidence (i.e., more likely than not)
 - At the conclusion of the investigation, the EO incident will be either unsubstantiated or substantiated and a recommendation will be made
 - Strict time standards exist for completion of the clarification
 - If the EO incident is substantiated, a legal review is required before the report is forwarded to the concerned commander for appropriate action
 - The complaint process allows for an appeal of the findings of the clarification of formal complaints of sexual harassment
- MEO will not investigate a complaint that involves criminal conduct
 - Criminal conduct will be handled by the installation's law enforcement community
- MEO will not investigate a complaint filed by a civil service employee, but, rather, will document the complaint and refer it to EEO regardless of the status of the alleged offender

Complaint Processing – Civilian Employee Complainant

- The EEO counselor is the OPR for complaints of sexual harassment brought by civilian employees
- Pre-Complaint: After a complainant has made initial contact with the EEO Office, an EEO counselor will advise the complainant of certain rights and obligations, place all allegations in the pre-complaint process regardless of merit or timeliness, and attempt to resolve the situation between the parties. The EEO counselor has 30 days to complete this process (60 days upon agreement by the complainant).
- If the EEO counselor is unable to resolve the situation during pre-complaint processing, the complainant is advised that he/she may file a formal complaint of discrimination
- Formal Complaint: The EEO counselor will, among other things, advise the complainant of additional rights during the formal complaint process

- During this time, the complaint is evaluated by both the civilian personnel office (CPO) and the legal office for soundness and possible settlement
- The installation EEO Manager requests a complaint investigator from the investigations and resolutions division (IRD) within 30 days of the date the formal complaint was filed
- IRD will investigate the complaint and send a copy of the report of investigation and complaint file to the Installation EEO Manager, Air Force Civilian Appellate Review Office (AFCARO), and the complainant or complainant's designated representative
- The complainant must then elect whether an Equal Employment Opportunity Commission (EEOC) hearing is desired or whether he/she prefers the Air Force or Space Force to issue a final decision
- The complainant and the commander can meet and discuss possible resolution of the complaint during the period of time the complainant is deciding which route to pursue
- The complainant has 30 days from receipt of the report of investigation to request an EEOC hearing
- After the formal complaint process, it is possible for the complainant to make various appeals and eventually file suit in federal court. Should this situation arise, immediately consult the legal office for further information and guidance.

Command Options to Address Substantiated Complaints of Sexual Harassment

- Commanders who find military personnel to have engaged in sexual harassment have the usual disciplinary and administrative options, including counseling, admonishment, reprimand, nonjudicial punishment, administrative discharge, and court-martial
- Commanders who find civilian personnel to have engaged in sexual harassment should normally focus any disciplinary action on the offensive act or acts involved (e.g., unwelcome touching, offensive comments) rather than alleging sexual harassment, and may deal with the misconduct pursuant to AFI 36-704, *Discipline and Adverse Actions of Civilian Employees*

REFERENCES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

The Civil Rights Act of 1991, Pub. L. 102-166, as amended 42 U.S.C. § 2000e

Complaints of Sexual Harassment: Investigation by Commanding Officers, 10 U.S.C. § 1561

29 C.F.R. Part 1614 (2016)

DoDD 1350.2, *Department of Defense Military Equal Opportunity (MEO) Program* (18 August 1995), certified current 21 November 2003, incorporating through Change 2, 8 June 2015

DoDI 1020.03, *Harassment Prevention and Response in the Armed Forces* (8 February 2018), incorporating Change 1, 29 December 2020

AFI 36-701, *Labor Management Relations* (14 November 2019)

AFI 36-704, *Discipline and Adverse Actions of Civilian Employees* (3 July 2018)

AFI 36-2710, *Equal Opportunity Program* (18 June 2020), including AFI36-2710_AFGM2020-01, 9 September 2020

AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018), incorporating Change 1, 30 September 2020

SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

The Servicemembers Civil Relief Act (SCRA) provides a wide range of protections for service members whose duties might interfere with certain civil obligations and proceedings. The Act (previously called the Soldiers and Sailors Civil Relief Act) was enacted in 1940. In 2003, the Act was revised and renamed the Servicemembers Civil Relief Act. Congress regularly amends the act with the goal of allowing service members to focus on the military mission first.

- The Act applies to active duty members in civil matters, **NOT** criminal matters
- The SCRA also provides certain benefits and protections to dependents of service members
- SCRA generally covers the time period on active duty. However, some provisions apply to pre-service obligations (e.g., vehicle leases entered into prior to entry on active duty) or to the period following active service.

Most Common and Relevant Provisions

- Eviction:
 - The SCRA prohibits eviction of a service member and dependents from rented housing, without a court order, where the rent does not exceed \$3,991.90 per month
 - This amount is adjusted every February using a cost-of-living formula found in the Act and posted in the Federal Register
 - A court may delay eviction proceedings for up to three months, unless, in the opinion of the court, the ability of the tenant to pay the agreed rent is not materially affected by the tenant's military service
- Liens (Storage and Towing Companies): A person holding a lien on a service member's property or effects may not foreclose or enforce any lien on the property or effects without a court order during any period of military service and for 90 days thereafter
- Landlord-Tenant Lease Termination:
 - A service member may unilaterally cancel a residential lease, without fees, upon entering service or if they receive permanent change of station orders, separation/retirement orders, or deployment orders for more than 90 days
 - On 14 August 2020, the SCRA was amended to allow service members to terminate residential leases when they receive stop movement orders. This amendment is retroactive to 1 March 2020.
 - To terminate a residential lease, the service member must submit a written notice and a copy of his/her military orders, or a letter from a commanding officer, by hand delivery, United States Postal Service (USPS) return receipt requested, or private carrier to the landlord or landlord's agent
 - An amendment of the Veterans Benefits and Transaction Act (VBTA) of 2018 allows a spouse of a service member to terminate a residential lease within one year of the service member's death as long as the service member died while in military service or while performing full-time Air National Guard (ANG) duty, active Guard and Reserve duty, or inactive duty training (as defined in 10 U.S.C. § 101(d))
- Vehicle Lease Termination:
 - A service member may cancel a **pre-service** lease for a motor vehicle if they receive orders bringing them onto active duty

- A service member may cancel **any** motor vehicle lease (pre-service or signed during service) for deployment orders for more than 180 days, or PCS orders to a location outside of the continental United States (CONUS), or PCS orders from Alaska or Hawaii to any location outside of those states
- Early termination fees are prohibited
- On 14 August 2020, the SCRA was amended to allow service members to terminate vehicle leases when they receive stop movement orders. This amendment is retroactive to 1 March 2020.
- Installment Contracts:
 - A service member who enters into an installment contract (such as car loans) before entering active duty is protected if either a deposit or at least one installment payment has been paid before entering military service
 - The creditor cannot exercise rights of rescission, termination, or repossession without a court order
- Telephone Contracts Termination:
 - A service member may terminate a cellular or landline telephone contract if the service member receives military orders or relocates for a period of not less than 90 days to a location that does not support the contract. This includes deployment or temporary duty assignment (TDY) orders for 90 days or longer and PCS orders.
 - Cancellation or suspension is without penalties or extra fees, and the service provider must refund any payments that were made in advance for services that were not provided
- Multichannel Video Programming and Internet Service Contracts Termination:
 - An amendment to the VBTA of 2018 allows a service member to terminate an internet service or multichannel video programming contract if the service member receives military orders or relocates for a period of not less than 90 days to a location that does not support the contract
 - “Multichannel video programming service” is defined in 47 U.S.C. § 522.
 - The Federal Communications Commission currently interprets this definition to include cable and satellite providers but not online-only services such as Hulu and Netflix
- Maximum Rates of Interest:
 - The interest rate on a service member’s **pre-service** consumer debt or mortgage obligation must be capped at six percent, including most fees, unless the creditor shows that the ability of the service member to pay interest above six percent is not materially affected by reason of their military service
 - This relief applies during the entire period of active duty service, plus one year after duty, and must be applied retroactively if not requested at the outset of military service
 - The following types of financial obligations, among others, are currently eligible for the six percent SCRA interest rate benefit: credit cards; automobile, ATV, boat and other vehicle loans; mortgages; home equity loans; and student loans

- Stay of Proceedings:
 - Courts have the discretion to delay a civil court proceeding when the requirements of military service prevent the service member from either asserting or protecting a legal right. The courts will look to whether military service **materially affected** the service member's ability to take or defend an action in court.
 - If the service member submits communication to the court showing: (1) how military requirements materially affect the ability to appear, (2) the date when the service member will be available to appear, and (3) communication from the commanding officer stating that the duty prevents appearance and leave is not authorized, the court **must** grant a stay of at least 90 days
- Default Judgments:
 - Before a court can enter a default judgment (for failure to respond to a lawsuit or failure to appear at trial) against a service member, the person suing the service member must provide the court with an affidavit stating the defendant is not in the military
 - If the defendant is in the military, the court will appoint an attorney to represent the defendant's interests (usually by seeking a delay of proceedings)
 - If a default judgment is entered against a service member, the judgment may be reopened if the service member makes an application within 90 days after leaving active duty showing prejudice by virtue of military service and demonstrating the existence of a legal defense
- Insurance:
 - *Life Insurance:* A service member's private life insurance policy is protected against lapse, termination, or forfeiture for nonpayment of premiums for a period of military service plus two years. The insured or beneficiary must apply to the Veterans' Administration (VA) for protection.
 - *Professional Liability Insurance:* Malpractice insurance must "freeze" when the member enters military service and then resume (exactly where it left off) after release from military service
 - *Health Insurance:* Pre-service health insurance plans must be reinstated upon termination or release from active duty, if the member applies within 120 days. Coverage will not be subject to any new exclusions or waiting periods that were not included in the original coverage, as long as the condition was not determined by the VA to be a disability incurred during or aggravated by military service.
- Taxation: A service member's state of legal residence may tax military income. A service member does not lose legal residence solely because of a transfer pursuant to military orders. For example, if a member is a Virginia resident and is moved to a base in California, the service member does not lose Virginia residency nor will he or she be subject to pay California state income tax on his or her military pay. Also, a non-resident service member's pay may not be used to "lift" a spouse's pay into a higher tax bracket.
- Pre-Service Mortgages: Significant protections exist against foreclosure regarding mortgages obtained before a service member was called to active duty service. If foreclosure is initiated during active duty service, or within one year following active service, foreclosure can only be obtained with a court order and the court should stay the proceedings or adjust the obligation if the ability to pay is materially affected by service.
- Adverse Actions: Creditors and insurers may not use a service member's exercise of rights under the SCRA as the sole basis for taking an adverse action (e.g., denial of credit, refusal of insurance) against the service member

- Child Custody: A state court is prohibited from considering a service member's deployment as the sole factor in determining the best interests of the child, though this provision does not create a federal right of action
- Military Spouses Residency Relief Act (MSRRA):
 - The MSRRA prevents state and local entities from gaining tax jurisdiction of a military spouse if the spouse's presence in the state was due solely to accompany the service member at the member's duty station
 - Spouses can simply elect to have the same residence for state and local tax purposes as the service member. If a service member is a legal resident of a particular state for tax purposes, the spouse can unilaterally elect to also be a resident of that same state. A spouse may make this election starting with the 2018 taxable year.
- Residence of Spouses of Service Members for Voting: The VBTA of 2018 allows a spouse to elect to have the same residence as the service member for voting purposes even if the spouse has never been present in that state

SCRA Application ANG Service Members

- Certain provisions of the SCRA apply to service members in Title 32 state status called to duty for 31 days or more in response to a national emergency declared by the President and supported by federal funds
- When ordered to duty under 10 U.S.C., SCRA protections begin on the date the member is ordered to such duty. Verbal activation orders under 10 U.S.C., later confirmed in writing, are sufficient to confer upon service members certain benefits and protections afforded by the SCRA
- NOTE: Many states have statutes or regulations that provide benefits similar to those afforded by the SCRA, even if the SCRA itself does not apply. Upon activation, a state Judge Advocate should be consulted to determine the protections and benefits afforded to military members.

REFERENCES

Military Spouses Residency Relief Act, 50 U.S.C. §§ 3955, 4001, 4025

Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901– 4043

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) encourages non-career military service by minimizing civilian employment problems resulting from such service. USERRA prohibits discrimination and acts of reprisal against members who serve in the uniformed services.

Overview

- An employer, including any government or private entity, regardless of size, may not deny a person initial employment, promotion, or any benefit of employment because the person performed or is obliged to perform service in a uniformed service
 - “Uniformed services” means the Air Force, Space Force, Army, Navy, Coast Guard, Marine Corps, the Commissioned Corps of the U.S. Public Health Service, Army National Guard, and the Air National Guard (ANG)
 - Service in the uniformed service means performing duty on a voluntary or involuntary basis. It includes active duty, active and inactive duty for training, initial active duty for training, full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty.

Eligibility Criteria

- To have reemployment rights following a period of uniformed service, a person must meet all of the following eligibility criteria:
 - Must have held a civilian job, which may include temporary jobs
 - Must have given advance notice to the employer that they were leaving the job for service in a uniformed service, unless such notice is impossible or unreasonable
 - The period of service does not exceed five years
 - The period of service is cumulative as long as the person is employed by or seeking reemployment with the same employer. A person starting a new job with a new employer receives a new five-year entitlement.
 - For purposes of federal employment, the entire federal government is considered the employer, not any one individual agency
 - Most periodic and special Reserve and National Guard training, most service in time of war or emergency, and involuntary extensions on active duty do not count toward the five-year limit
 - The Assistant Secretary of the Air Force has exempted certain periods of service from the five-year limit as expressed in the Memorandum from the Assistant Secretary of the Air Force, *Civilian Reemployment Protections for Air Force Military Personnel* (10 October 2018).
- Must have been released from service under honorable conditions
- Must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment

Table 10.1 USERRA Application Timeline

Period of Military Employment	1-30 Days	31-180 Days	More than 180 Days
Application Requirements	Report next scheduled work period — after sufficient time to allow safe transportation from military training site to the person's place of residence, plus 8 hours	Apply within 14 days following completion of service	Apply within 90 days following completion of service

Entitlements

- People who meet the eligibility criteria under USERRA have seven basic entitlements:
 - Prompt reinstatement, meaning, as soon as is practicable under the circumstances of each individual
 - Accrued seniority, as if the person had been continuously employed
 - This is the “escalator principle,” requiring each returning service member to be reemployed in the position the person would have occupied with reasonable certainty if the person had remained continuously employed, with full seniority
 - The “status” the person would have attained if continuously employed includes location, opportunity to work during the day instead of at night, and the opportunity to work in a department or at such times when there are better opportunities to earn commissions or to be promoted
 - Immediate reinstatement of civilian health insurance coverage, if the member does not elect to continue it during service
 - Employees are entitled to non-seniority rights and benefits at the time they left for military service, and to those rights and benefits that became effective during their service and that are provided to similarly situated employees on furlough or leave of absence
 - Training or retraining and other accommodations
 - Employers must provide refresher training and any other training necessary to update a returning employee's skills so he or she has the ability to perform the essential tasks of the position
 - If the employee incurs or aggravates a disability during the period of uniformed service, the employer must make reasonable efforts to accommodate the disability and to help the employee become qualified to perform the duties of the reemployment position
 - If the disabled person cannot become qualified for the reemployment position despite reasonable efforts by the employer to accommodate the employee and qualify him or her to perform the duties of the position, the employee must be reemployed in a position according to the following priority: (a) a position that is equivalent in seniority, state, and pay to the escalator position, or (b) a position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case

- A reemployed employee shall not be discharged without cause:
 - For one year after the date of reemployment if the person's period of military service was for 181 days or more
 - For 180 days after the date of reemployment if the person's period of military service was for 31 to 180 days
 - No special protection exists for service of 30 days or less
- Prohibition against discrimination or reprisal
 - An employer cannot deny initial employment, reemployment, retention, promotion, or any benefit of employment because of a person's service or application to serve in the uniformed services
 - An employer also may not take adverse employment action against a person because they either take enforcement action under USERRA, testify or assist in an USERRA investigation, or exercise any right under USERRA

Assistance and Enforcement

- The Veterans' Employment and Training Service (VETS) within the United States Department of Labor will assist persons claiming rights under USERRA, including persons claiming rights with respect to the federal government as a civilian employer. They can be reached at 1-866-487-2365 or through their website at <https://dol.gov/vets/programs/userra>.
- The Office of Employer Support of the Guard and Reserve (ESGR) will also assist service members in enforcing USERRA. They can be reached at 1-800-336-4590 or through their website at <https://esgr.mil/USERRA/USERRA-Contact>.

REFERENCES

Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–4335 32 C.F.R. Part 104 (2011)

20 C.F.R. Part 1002 (2011)

DoDI 1205.12, *Civilian Employment and Reemployment Rights for Service Members, Former Service Members and Applicants of the Uniformed Services* (24 February 2016), incorporating Change 1, 20 May 2016

Memorandum from the Office of the Assistant Secretary of the Air Force, *Civilian Reemployment Protections for Air Force Military Personnel* (10 October 2018)

U.S. Department of Labor – Veterans' Employment & Training Service website, <https://www.dol.gov/agencies/vets/programs/userra>

Employer Support of the Guard and Reserve USERRA website, <https://esgr.mil/USERRA/What-is-USERRA>

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

In 1982, Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA) to provide certain benefits to the former spouses of military members. Generally, the USFSPA allows courts to treat military retired pay as property subject to division in a divorce and provides certain additional benefits to former spouses.

Overview

- The USFSPA accomplishes two things:
 - It recognizes the right of state courts to distribute military retired pay to a former spouse if a former spouse was awarded a portion of a member's military retired pay as property in their final court order
 - It provides a method of enforcing these court orders through the Department of Defense. Enforceable court orders include final decrees of divorce, dissolution, annulment, and legal separation, and court-ordered property settlements incident to such decrees. The pertinent court order must provide for the payment of child support, alimony, or retired pay as property, to a former spouse.

Division of Retired Pay as a Marital Asset or Community Property

- Retired pay as property awards must be expressed as a fixed dollar amount or a percentage of disposable retired pay (gross retired pay less authorized deductions)
- An award of a percentage of a member's retired pay is automatically construed under the USFSPA as a percentage of disposable retired pay
 - For divorce decrees entered after 23 December 2016 (in a case where the order becomes final prior to the member's retirement), the service member's disposable income is limited to "the amount of the basic pay payable to the member for the member's pay grade and years of service at the time of the court order" and increased by the cost-of-living amounts granted to military retirees from the time of the divorce to the date the member retires

Enforcement of Court Orders

- The 10/10 Rule: For orders dividing retired pay as property to be enforced under the USFSPA, a member and former spouse must have been married to each other for 10 years or more during which the member performed at least 10 years of military service creditable towards retirement eligibility
- In order to enforce a court order dividing retired pay as property, the state court must have had jurisdiction over the member by reason of (1) the member's domicile in the territorial jurisdiction of the court, (2) the member's residence in the territorial jurisdiction of the court (other than because of military assignment), (3) the member's consent to the jurisdiction of the court, or (4) the member indicates his or her consent to the court's jurisdiction by taking some affirmative action in the legal proceeding
- The 10/10 Rule and the jurisdictional requirement do not apply to enforcement of child support or alimony awards under the USFSPA

How to Apply

- To apply for payments under the USFSPA, a former spouse must submit a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, and a copy of the applicable court order certified by the clerk of the court to the Defense Finance and Accounting Service (DFAS)

- DFAS provides an application checklist and access to DD Form 2293 on its website at <https://www.dfas.mil/Garnishment/usfspa/apply/>.

Survivor's Benefit Plan (SBP)

- A member may elect to provide coverage under the Survivor's Benefit Plan (SBP) for a former spouse who was originally a "spouse" beneficiary under SBP, provided the parties were divorced after the member became eligible to receive retired pay
- A former spouse may initiate SBP coverage on their own behalf ("deemed election"), provided this election is made within one year of the issuance of the court order requiring SBP coverage

Maximum Payment Amount

- The maximum that can be paid to a former spouse under the USFSPA is 50 percent of a member's disposable retired pay
- In cases where there are payments both under the USFSPA and pursuant to a garnishment for child support or alimony, the total amount payable cannot exceed 65 percent of the member's disposable earning for garnishment purposes

REFERENCES

Uniformed Services Former Spouses' Protection Act, 10 U.S.C. §§ 1408

32 C.F.R. Part 63.6 (1999)

DoD Financial Management Regulation (FMR) 7000.14-R (February 2021)

DD Form 2293, *Application for Former Spouse Payments from Retired Pay* (April 2018)

Defense Finance and Accounting – Former Spouses' Protection Act website,
<https://www.dfas.mil/Garnishment/usfspa/legal/>

ENSURING THE FAIR HANDLING OF DEBT COMPLAINTS AGAINST SERVICE MEMBERS

Service members have the same legal rights under state and federal law as civilian consumers. It is important for commanders to understand that both law and Department of Defense (DoD) policy make a distinction between dealing with third party “creditors” with whom the debt originated, and “debt collectors” who are in the business of collecting debts for another person or business.

- The Fair Debt Collection Practices Act (FDCPA) is a federal law that regulates how debts may be collected. The FDCPA regulates debt collection agencies and attorneys and does not apply to original creditors.
 - A creditor is defined as a person or entity to whom or to which a debtor owes money. Most major creditors, particularly credit card companies, have adopted collection policies that do not violate federal law. Original creditors are also regulated by state laws which may closely follow the FDCPA.
 - Debt collectors are in the business of collecting debts that are owed to creditors. This includes individuals, collection agencies, lawyers who collect debts on a regular basis, and companies that buy delinquent debts and then try to collect them. Debt collectors are strictly limited in how they conduct their activities under both the FDCPA and state law. Therefore, if a debt collector’s conduct violates the FDCPA, as noted in the following sections, it may also violate applicable state law.
- Specific procedures for commanders to address cases alleging a service member’s delinquent financial obligations are outlined in AFI 36-2906, *Personal Financial Responsibility*

Debt Collector Communications with the Chain of Command

- The purposes of the FDCPA are to: (1) eliminate abusive debt collection practices; (2) ensure that those collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and (3) to promote consistent state action to protect consumers against debt collection abuses
- Accordingly, debt collectors are generally **prohibited** from contacting third parties — including commanders and first sergeants — without a court order or the debtor’s prior consent given directly to the debt collector. This is because the debt collector should be dealing directly with the service member/debtor. There are two limited exceptions to this rule:
 - First, a creditor or debt collector can call and ask for the member’s contact information, but they are not permitted to identify themselves as someone calling regarding a debt
 - Second, if the member has given a creditor or debt collection written permission after the debt was created
- Under these exceptions, debt collectors may only contact the command section and may only do so once. Absent these circumstances, a debt collector should not be contacting the command section.
- Furthermore, under DoD policy, the chain of command’s assistance in indebtedness matters shall not be extended to creditors who have not made a bona fide effort to collect the debt directly from the member, whose claims are patently false and misleading, or whose claims are obviously exorbitant

Debt Collector Communications with the Service Member/Debtor

- A debt collector is allowed to directly contact and communicate with a debtor, but the FDCPA limits where, when, and how these communications may occur. The FDCPA requires a debt collector to furnish a debtor with written notice of the debt within five days after first communicating with him/her.
 - The notice must identify the debt, the creditor, and how the debtor can require the debt collector to verify the debt (if the debtor believes payment has already been made or the amount of the debt is incorrect)
- If the debtor chooses to dispute the existence or amount of the debt, he/she must do so within 30 days of receiving this notice. Once a debt is disputed, the debt collector must stop communicating with debtor until the debt is verified and a copy of that verification is mailed to the debtor.
 - A debtor who refuses to pay a debt should make those intentions known to the debt collector in writing
 - Once the debt collector has written notification that the debtor does not plan to pay the debt, he/she should cease communications with the debtor. The debt is not forgotten, however, and a debt collector can still file a lawsuit to recover the amount that is owed. A debt collector may still communicate with a debtor for the limited purpose of notifying him/her of plans to pursue a lawsuit.

Prohibited Debt Collector Communications

- The FDCPA prevents debt collectors from a number of illegal actions:
 - Harassing the alleged debtor or others
 - Includes threats of violence, use of obscene language, repeated or continuous phone calls, and threats to contact third parties
 - Debt collectors cannot contact the alleged debtor at unusual hours, such as before 0800 or after 2100
 - Failure to send the required notice
 - When a debt collector first contacts the alleged debtor, they must notify him/her within five days of (1) the amount of the debt, (2) name of the original creditor, (3) the right to dispute the debt, (4) the right to obtain validation of the debt, and (5) the right to obtain the name and address of the original creditor
 - Continuing to contact the consumer after receiving a notice from the consumer to cease all communication
 - Failure to honor this demand is a violation of the FDCPA
 - Revealing the debt to third parties
 - Third-party contacts are generally unauthorized, which includes the chain of command
 - Calling the consumer's place of employment
 - Threatening dire consequences if the consumer fails to pay
 - Some debt collectors may falsely threaten a lawsuit or other action that they do not intend to take. Others falsely threaten arrest or the seizure of property.
 - Some debt collectors may threaten an action they are not authorized to pursue, such as revoking a security clearance or obtaining a demotion

--- Creditors can obtain a judgment against the debtor for the debt they owe, but the creditor must first notify the debtor of the court action

Remedies for Affected Service Members

- If a debt collector has violated the law, the debtor has the right to sue the collector in state or federal court within one year of the date the law was violated
- Any problems in dealing with debt collectors should be reported immediately to the base legal office. Additionally, service members may contact the Consumer Financial Protection Bureau (CFPB), the state Attorney General's Office, and the Federal Trade Commission (FTC) for further assistance.
- Service members have the right to dispute a debt listed on their credit report, and to request a free copy of their credit report, in accordance with the Fair Credit Reporting Act (FCRA)
- Service members should consult with a legal assistance attorney before making payments to a debt collector and to find out more about their rights under applicable law

REFERENCES

Fair Debt Collection Practices Act, 15 U.S.C. § § 1692 *et seq.*

Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*

DoDI 1344.09, *Indebtedness of Military Personnel* (8 December 2008)

AFI 36-2906, *Personal Financial Responsibility* (30 July 2018)

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CHAPTER ELEVEN: CIVIL LAW ISSUES

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NATIONAL DEFENSE AREA (NDA)

Department of the Air Force commanders are charged with responsibility for protecting Department of Defense (DoD) resources under their control. That responsibility is not limited to resources located on federal lands under DoD jurisdiction, but applies to such resources wherever they are located. For the most part, commanders rely on federal, state, and local civil authorities to protect off installation assets.

- It may be necessary — as a tool of last resort — to establish a National Defense Area (NDA), thereby enabling direct military protection of *covered property* when that property is at unacceptable risk *in an emergency situation* (e.g., the crash of a Protection Level (PL) 1, 2 or 3 aircraft or asset or classified information) within the United States (including its territories, possessions, and tribal lands)
- If the DoD covered property is on non-military but still federal lands, secure and coordinate with the other U.S. Government agency (OGA), as there is no legal impediment to establishing an NDA on federal lands to authorize the exclusion of even the federal land-owning agency
- Since there are no NDAs outside the United States (including its territories, possessions, and tribal lands), protection and defense of such property will be dictated by host-nation agreements (e.g., status of forces (SOFA) or other agreement) or through ad hoc mutual cooperation

Authority – DoD Policy to Protect People and Property

- The authority of a DoD commander to take reasonably necessary and lawful measures to maintain law and order and to *protect installation personnel and property* extends to temporarily established NDAs, in *emergency situations*, includes the removal from, or the denial of access to, an installation or site of individuals who threaten the orderly administration of the installation or site
- Commanders at all levels have the responsibility and authority to enforce appropriate security measures to ensure the protection of DoD property and personnel assigned, attached, or subject to their control
 - The DoD incident commander (IC) or on-site mission commander must establish and declare an NDA involving any accident where the DoD does not have exclusive jurisdiction of the area containing a *covered property* when that property is at unacceptable risk *in an emergency situation* (e.g. nuclear weapon and related classified components or materials.) The DoD IC will typically be the installation commander responsible for the property.

Federal Penalty for Violating Security Regulations that Protect “Covered Property”

- It is a misdemeanor crime to violate defense property security regulations for the protection or security of DoD property or regulations for the protection or security of NASA property

Enforcement

- Normally, civilian law enforcement authorities should enforce the exclusion of non-DoD personnel, whether or not an NDA has been declared
- Military personnel may remove NDA trespassers from the property or detain them — without fear of violating the Posse Comitatus Act (PCA) until they can be transferred to civil authorities. Military action to detain civilian trespassers is limited to the NDA.
 - Unless they pose an immediate threat to life or possess military property, pursuit of fleeing civilian offenders by military authorities is limited to the immediate NDA area and any pursuit outside the NDA should be left to civilian law enforcement authorities

Definitions and Policy

- DoD commanders **MUST** *take reasonably necessary and lawful measures* to maintain law and order and to protect installation personnel and property. In emergency situations, commanders shall establish an NDA when an accident occurs on non-federal land involving federal equipment or personnel.
- NDA:
 - An area established on non-federal lands located within the United States, its territories, or possessions for the purpose of safeguarding classified defense information or protecting DoD equipment and/or materiel
 - Establishment of an NDA temporarily places such non-federal lands under the effective control of the DoD and results only from an emergency event
 - The senior DoD representative at the scene will define the boundary, mark it with a physical barrier, and post warning signs
 - The landowner's consent and cooperation will be obtained whenever possible. However, military necessity will dictate the final decision regarding location, shape, and size of the NDA.
 - An NDA can be established within the United States, its territories, or possessions
 - Outside the United States: Protection and defense of U.S. property off an installation will be dictated by host-nation agreements (e.g., SOFA or other agreement) or through ad hoc mutual cooperation in the absence of an agreement. This is not called an NDA.
 - On non-military federal lands: Coordinate with the OGA (or the Bureau of Indian Affairs, for tribal lands) but do not delay a military response to adequately secure the site if federal civil authorities cannot adequately do so
- Covered Property:
 - Covered property is defined at 50 U.S.C. § 797(a)(4)(c) as "aircraft, airports, airport facilities, vessels, harbors, ports, piers, water-front facilities, bases, forts, posts, laboratories, stations, vehicles, equipment, explosives, or other property or places"
 - Limited by the Secretary of Defense (SecDef) to "emergency situations, such as accident sites involving federal equipment or personnel on official business"
 - Circumstances calling for an NDA can also include the crash of an aircraft with sensitive equipment or capabilities (e.g., a PL 1, 2, or 3 resource) or where aircraft are sent to civilian airports and unforeseen, inadequate, or uncontrollable civilian security concerns create an emergency; or other unplanned emergencies occur
 - Commanders must use exceptional judgment and should consult early with their staff judge advocate (SJA)
- Commander's Authority – Establishing an NDA:
 - DoD policy does not clearly restrict which commanders have authority to establish an NDA. However, DoD policy imposes an obligation on all commanders to protect property under their control. Installation commanders have primacy for property assigned to their installation.
 - The on-scene commander (OSC) or other senior DoD official should immediately secure the site and, ideally, seek approval from the installation commander (or designated incident commander) responsible for the asset or information before officially declaring an NDA and posting signage

- The responsible commander does not need to be physically present to establish an NDA. For example, a subordinate commander to whom responsibility for protecting the property has been entrusted (e.g., convoy commander, in the case of missile transfer; on-site mission commander) may establish the NDA when time is of the essence.
- A written order authorizing creation of the NDA should follow
- Emergency Situations:
 - SecDef has limited establishing an NDA solely to “emergency situations.” Historically, this means an off-installation U.S. crash site involving PL 1, 2 or 3 aircraft.
 - Accidents are just one example and should not be considered exhaustive for purposes of emergency situations warranting establishment of an NDA
 - Not all accidents — even those involving particularly sensitive equipment or information such as PL 1, 2 or 3 resources — will necessarily warrant an NDA. This is particularly true when civil assistance is adequate.
 - Aircraft or other diversions or breakdowns of even highly sensitive (but nonnuclear weapon) property will not constitute an emergency unless there is some specific and articulable additional basis to believe the property is at unacceptable risk that is adequately mitigated solely through seizure of land

Consent as the Means of First Resort

- Whether or not an NDA is to be established at the site of an NDA-qualifying emergency or lesser activity, *landowner consent and military accommodation of the landowner's concerns* will be important to reduce the uncertainty of inflated claims and public perception or media scrutiny. Even absent landowner consent, military necessity and capacity to control the site ultimately drives the location, size, and shape of an NDA. Early consultation with the servicing SJA is important and advisable.

Marking and Public Notice

- The OSC or senior DoD official is responsible for adequately marking the NDA as required by AFI 31-101, *Integrated Defense*
- Use a temporary barrier, such as tape, rope, or wire, to mark and clearly define the boundary of the area. Post Air Force Visual Aid (AFVA) 31-102 at all entry control points.
- The supporting SJA (or designee) should evaluate whether or not it is necessary to request that higher headquarters publish notice in the local newspaper and in the Federal Register

Airspace Considerations

- If it is necessary to establish an NDA, consider whether airspace restrictions are also necessary, especially given the proliferation of small unmanned aircraft systems (sUAS) with cameras or other sensing/payload capabilities. If airspace restrictions are deemed necessary, commanders may request the Federal Aviation Administration (FAA) impose a Temporary Flight Restriction (TFR).
- The FAA may impose TFRs for a number of reasons, to include reasons of national security at the request of a military command. Report TFR violations to FAA for enforcement.

Media and Public Relations

- As with any crash or other noteworthy incident, public affairs (PA) should be briefed immediately following the establishment of an NDA. Command post up-channels information.

- Cover, shield, or protect sensitive property from both ground-based and overhead view
- Incident commanders or the senior representative should be sensitive to interests of the media, and should limit photography only as much as necessary to protect classified information. It may be sufficient to simply limit photography to those angles or distances which would not result in exposure of classified information; or to shield sensitive or classified assets from view using camouflage netting, curtains, tarps, etc.
- Media representatives should be briefed on appropriate releasable information during a nuclear accident or incident and the procedures to be followed, such as escort requirements. If the off-base site is designated as an NDA, support news media representatives, to the extent feasible, as would occur on a military installation.
- If an NDA has been established, military authorities may use reasonable force to prevent all photography by anyone within the NDA and seize film or video equipment. If photography is done from outside the NDA, civilian authorities should handle the matter; but if civil authorities are unwilling or unable to assist, the commander concerned should contact the managing editor or director of the news agency employing the photographer, request return of the film suspected of containing classified information, and explain that failure to return the film may constitute a violation of federal law.

REFERENCES

- U.S. Const. art. VI, cl. 2 (Supremacy) and Amend. V, cl. 4 (Takings)
- Use of Aircraft for Photographing Defense Installations, 18 U.S.C. § 796
- Entering Military, Naval, or Coast Guard property, 18 U.S.C. § 1382
- Penalty for Violation of Security Regulations and Orders, 50 U.S.C. § 797
- 14 C.F.R. Part 91, *General Operating and Flight Rules*
- 14 C.F.R. Part 99, *Security Control of Air Traffic*
- Executive Order 10104, *Defining Certain Vital Military and Naval Installations and Equipment as Requiring Protection Against the General Dissemination of Information Relative Thereto* (1 February 2020)
- U.S. v. Aarons, 310 F.2d 341 (2d Cir. 1962)
- DoDS5210.41-M_AFMAN31-108V1-S, (S)*The Air Force Nuclear Weapon Security Manual*(U) (2 May 2019)
- DoDS5210.41-M_AFMAN31-108V2-S, (S)*General Nuclear Weapon Security Procedures*(U) (20 May 2019)
- DoDS5210.41-M_AFMAN31-108V3-S, (S)*Nuclear Weapon Security Manual: Nuclear Weapon Specific Requirements*(U) (20 May 2019)
- DODI 5200.08, *Security of DoD Installations and Resources and the DoD Physical Security Review Board (PSRB)* (10 December 2005), incorporating Change 3, 10 November 2015
- DoDM 3150.08, *Nuclear Weapon Accident Response Procedures (NARP)* (22 August 2013), incorporating Change 2, 21 July 2020
- DoDM S-5210.41, Volume 1, *Nuclear Weapon Security Manual: General Nuclear Weapon Security Procedures* (11 August 2016), incorporating Change 2, 31 August 2018
- DoDM S-5210.41, Volume 3, *Nuclear Weapon Security Manual: DoD Nuclear Weapon Environment Specific Requirements* (11 August 2016), incorporating Change 2, 31 August 2018
- AFI 31-101, *Integrated Defense (ID)* (25 March 2020)
- AFI 31-117, *Arming and Use of Force by Air Force Personnel* (6 August 2020)
- AFI 10-2501, *Emergency Management Program* (10 March 2020)
- AFI 35-101, *Public Affairs Operations* (20 November 2020)
- AFI 51-306, *Administrative Claims For And Against the Air Force* (14 January 2019), incorporating Change 2, 17 July 2020
- AFVA 31-102, *Restricted Area Sign-National Defense*
- FAA Advisory Circular (AC) No. 91-63D, *Temporary Flight Restrictions* (9 December 2015)

POSSE COMITATUS

The Posse Comitatus Act

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both

Punishment for Violations

- Possible criminal sanctions for violating the Posse Comitatus Act:
 - Fine and/or two years imprisonment
 - Suppression of evidence illegally obtained

Posse Comitatus Prohibitions

- Prohibitions: The armed services are precluded by law from enforcing, or assisting local law enforcement officials in enforcing, civilian laws — except as authorized by the Constitution or act of Congress
 - By its terms, the Act applies only to the Army and Air Force
 - The Navy and Marine Corps follow the Act by Department of Defense (DoD) Policy pursuant to DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies*
 - The Act applies to the Reserve and to National Guard members while in a Title 10 federal status (i.e., as Army or Air National Guard of the United States), but not to the National Guard while in a Title 32 state status (i.e., organize, train and equip under the Governor's control) or state active duty status, under the Governor's control at the state's expense
 - The Act **DOES NOT** apply to the Coast Guard
- The Act does not apply to off-duty conduct, unless induced, required, or ordered by military officials
 - Active duty enlisted members may accept a position as a reserve peace/police officer and lawfully perform law enforcement duties under the direction and control of their civilian law enforcement agency employer. Note: In accordance with 10 U.S.C. § 973, active duty officers (with exceptions for some retired and reserve officers) are prohibited from civil appointment.
 - A member is considered off-duty and acting in a private capacity when the member responds on his or her own volition to assist law enforcement officials and is not under the direction or control of DoD authorities (e.g. Good Samaritan)
- The Act does not apply to civilian employees, unless acting under the direct command and control of a federal military officer

Exceptions to Posse Comitatus

- Statutory Exceptions: By its terms, the Act does not preclude support “expressly authorized by the Constitution or Act of Congress.” Congress has enacted a number of statutory provisions falling into this category.

- Several statutes authorize the military to engage in actions that would otherwise violate the Posse Comitatus Act:
 - 10 U.S.C. § 271:
 - Allows the military to provide to federal, state, and local civilian law enforcement officials any information collected “during the normal course of military training or operations”
 - Requires the military to consider the needs of local law enforcement when planning training missions
 - Mandates the disclosure of intelligence information relevant to drug interdiction or other civilian law enforcement matters to civilian law enforcement officials
 - 10 U.S.C. § 272:
 - Allows the military to loan any equipment, base facility, or research facility to local law enforcement, although the military may charge for its use (see 10 U.S.C. § 277) and it must not interfere with the military mission
 - Loan of “arms, ammunition, tactical-automotive equipment, vessels and aircraft” requires proper coordination
 - 10 U.S.C. § 273:
 - Makes military personnel available to train federal, state, and local civilian law enforcement officials on the operation and maintenance of equipment, including equipment loaned under 10 U.S.C. § 272, and to provide expert advice to such officials
 - 10 U.S.C. § 274:
 - Allows the Secretary of Defense (SecDef) to make military personnel available to operate and maintain equipment, including loaned equipment under 10 U.S.C. § 272
- The military is still prohibited from enforcing civilian laws. The military may not participate in a search, seizure, arrest, or similar activity in support of local law enforcement unless participation in such activity is otherwise authorized by law (10 U.S.C. § 275).
 - The military may enforce the civilian laws on an installation for a military purpose
 - Even on a military installation, the military “detains” civilians before turning them over to civil authorities. Military members do not arrest or apprehend civilians. This is a **CRITICAL** distinction.
- Federal military commanders, head of DoD components, and/or responsible DoD civilian officials have immediate response authority (IRA) as described in DoDD 3025.18, *Defense Support of Civil Authorities (DSCA)*. Commanders may exercise this authority in response to a request from a civilian authority for assistance when time does not permit coordination or approval from a higher authority in order to save lives, prevent human suffering, or mitigate great property damage.
 - Actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory are prohibited

REFERENCES

Military Support for Civilian Law Enforcement Agencies, 10 U.S.C. §§ 271-277

Duties: Officers on Active Duty; Performance of Civil Functions Restricted, 10 U.S.C. § 973

The Posse Comitatus Act, 18 U.S.C. § 1385

32 C.F.R. § 182, Defense Support of Civilian Law Enforcement Agencies (2017)

DoDD 3025.18, *Defense Support of Civil Authorities* (29 December 2010), incorporating Change 2, 19 March 2018

DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies* (27 February 2013), incorporating Change 1, 8 February 2019

AFI 10-801, *Defense Support of Civil Authorities* (29 January 2020)

AFI 31-118, *Security Forces Standards and Procedures* (18 August 2020)

AIR FORCE SAFETY AND ACCIDENT INVESTIGATIONS

DAFI 91-204, *Safety Investigations and Reports*, and AFI 51-307, *Aerospace and Ground Accident Investigations*, are the two principal instructions covering Department of the Air Force investigations of accidents. Safety investigations, conducted by a safety investigation board (SIB), are conducted solely to determine cause(s) in order to prevent future mishaps.

The deliberations, opinions, recommendations, and conclusions of safety investigators and any evidence from witnesses and contractors given under a promise of confidentiality are privileged and not releasable outside Department of Defense (DoD) safety channels.

Aircraft accident investigations, conducted by an accident investigation board (AIB), and ground accident investigations, conducted by a ground accident investigation board (GAIB), provide publicly-releasable reports (which include the non-privileged evidence gathered by the preceding safety investigation) and preserve evidence for litigation, claims, disciplinary action, and adverse administrative action.

Providing an alternate source of non-privileged information for use outside safety and operational channels protects the integrity of the safety privilege.

Safety Investigations

- A SIB is composed of a board of officers or a single investigating officer, depending on the mishap
 - Conducted solely for DoD mishap prevention purposes
 - Limited use even within the DoD and Department of the Air Force
 - **NOT** for disciplinary actions, line-of-duty determinations, flying evaluation boards, litigation, claims, or assessing pecuniary liability (for or against the government)
 - Witnesses are not sworn
 - SIB may offer a promise of confidentiality to witnesses or contractors if necessary and authorized
 - Privileged information in a safety report is barred from use in claims and litigation for or against the United States, even if it favors the Air Force
 - In *United States v. Weber Aircraft Corp.*, 46 U.S. 792 (1984), the Supreme Court upheld the safety privilege

Potential Challenges with Safety Investigations

- Misunderstanding: Misunderstanding the purpose and permissible or appropriate use of information gathered by safety investigators
- Interface with Accident Investigators:
 - Part of the safety report consists of non-privileged factual information and is releasable to the accident investigators
 - The safety investigation has priority over the accident investigation to wreckage, witnesses, and documents
- Queries from Next of Kin (NOK) of Mishap Victims:
 - Relatives normally speak with the family assistance representative appointed by the commander

- SIB personnel may not discuss the mishap or their investigation with anyone except the investigation convening authority. The AIB president or GAIB president will brief the AIB or GAIB report to NOK and answer questions.
- Requests for Information:
 - Determine whether the requester is asking for the SIB report, a GAIB, or AIB report
 - For SIB reports, the disclosure authority is the Commander, Air Force Safety Center (AFSEC). The office of primary responsibility (OPR) is AFSEC/JA.
 - For AIB and GAIB reports, direct requests to the staff judge advocate (SJA) of the convening authority responsible for initiating the investigation
- Appearance of Improper Use: Avoid creating the appearance of improper use of privileged safety information (e.g., for public disclosure, disciplinary actions, flying evaluation boards, etc.)
 - Imperative that commanders have “clean hands”
 - Document the source of information used to take action (non-privileged source(s))
- Criminal Misconduct: Safety investigations and potential courts-martial
 - Obtaining a conviction may be complicated by a safety investigation preceding the court-martial. The defense may request information that is privileged, resulting in potential litigation over its release.
 - To address that complication, where evidence of criminal misconduct relating to the cause of the mishap is present, the convening authority may delay the SIB and proceed with a legal/law enforcement investigation

Accident Investigations

- Accident investigations pursuant to AFI 51-307 are required for all on-duty Class A accidents except for (1) Class A accidents in which remotely piloted subscale aircraft and aerial targets are destroyed, (2) when there is only damage to federal government property and no safety investigation is done, and (3) for accidents involving an aerospace asset when the asset is not destroyed
 - Class A accidents include:
 - Cases where an injury or occupational illness results in a fatality or permanent total disability
 - Cases where an Air Force aerospace asset is destroyed
 - Cases where the total cost of damages to the government or other property is \$2,500,000 or more
- In addition, the following types of accidents require an accident investigation:
 - Cases with a probability of high public interest
 - Mishaps when claims and litigation are anticipated for or against the government or a government contractor as a result of the mishap
 - Mishaps causing significant civilian property damage
- Accident investigations otherwise not required may be convened at the convening authority's discretion for any occurrence considered an “accident” or “mishap”

Accident Investigation Responsibilities:

- Convening Authority: The MAJCOM commander who convened or would have convened the preceding safety investigation under DAFI 91-204. This authority is delegable to the MAJCOM deputy commander.
 - Convenes investigation
 - Ensures appropriate condolence letters are sent to NOK. Also, sends letter to the NOK of deceased and seriously injured personnel explaining process and status of ongoing investigations and of any planned NOK briefings.
 - Funds costs associated with conducting the accident investigation
 - Determines what accident information may be released to the public prior to completion of the AIB Report
 - Approves the AIB report and public affairs office (PA) notification and release plan
 - High-interest mishaps must be coordinated and staffed by the convening authority's SJA through AF/JA – Civil Law, Claims and Tort Litigation Division (AF/JACC) and AF/JA for review by the Secretary of the Air Force (SecAF) and the Chief of Staff of the Air Force (CSAF)
- Installation Commander:
 - Appoints a host installation liaison officer to assist the AIB in obtaining accommodations and administrative support, as well as facilitating witness interviews
 - Provides in-house facility, communications, supply, photography, and billeting support for the AIB
 - Removes and stores wreckage from the mishap site at the direction of the convening authority until AF/JACC releases it from legal hold
 - Assists the convening authority with initial cleanup of the mishap site
 - GAIB reports do not usually contain a statement of opinion, unless specifically authorized in advance by AF/JACC
 - Unlike AIBs, opinions of GAIB board presidents are not statutorily protected and may affect the United States in litigation
 - A well-documented and thorough GAIB report should allow facts to speak for themselves in most instances
- For aircraft accidents involving Air National Guard (ANG) members, the gaining MAJCOM convenes the AIB. However, the ANG has the discretion to conduct accident investigations using the framework set forth in AFI 51-307.

REFERENCES

United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)

AFI 51-307, *Aerospace and Ground Accident Investigations* (18 March 2019), including AFI51-307_AFGM2020-01, 26 February 2020

DAFI 91-204, *Safety Investigations and Reports* (10 March 2021)

ADMINISTRATIVE INQUIRIES AND INVESTIGATIONS

Commanders may be involved in or supervise several different types of investigative procedures. Reprisal against an individual for making a complaint is prohibited under 10 U.S.C. § 1034.

Inherent Authority to Investigate

- All commanders possess inherent authority to investigate matters or incidents under their jurisdiction, unless preempted by a higher authority. This authority is incident to command.
- Department of the Air Force policy states inquiries and investigations will be conducted by the echelon of command capable of conducting a complete, impartial, and unbiased investigation. However, commanders shall not investigate allegations concerning reprisal or restriction.
- When a specific regulation does not apply, the investigation is conducted under the commander's inherent authority
 - AFI 90-301, *Inspector General Complaints Resolution*, provides guidance (e.g., procedures, format) on how to conduct an investigation or inquiry, but AFI 90-301 **SHOULD NOT** be cited as the authority for the investigation or inquiry

Investigations Governed by Department of the Air Force Instructions

- AFI 90-301 provides guidance for IG investigations and inquiries
 - Only the Inspector General's Office (IGs) may investigate allegations concerning reprisal and restriction
 - Inquiries and investigations directed by the IG are privileged documents. The IG controls release of these documents in accordance with Freedom of Information Act (FOIA) and Privacy Act (PA) requirements.
- Other administrative investigations and inquiries, such as flying evaluation boards, aircraft mishaps, ground accidents, reports of survey, line of duty determinations, etc., are governed by specific regulations

Investigation Procedures

- Administrative investigations are often conducted by a single investigating officer (IO) who is equal or senior in grade to the subject(s) and who gathers all necessary evidence (facts, documents, witness testimony) to help the appointing authority make an informed decision
- Generally, the standard of proof for administrative investigations and inquiries is by a preponderance of the evidence
- If the matter is more properly within the domain of Security Forces Squadron (SFS) or the Air Force Office of Special Investigations (AFOSI) (e.g., suspected criminal activity, etc.), have those law enforcement agencies conduct the investigation
- Always consult with the servicing staff judge advocate (SJA) before directing any inquiry or investigation
- The Chief of Staff of the Air Force (CSAF) Hand-Off Policy Memorandum, Policy for Investigative Interviews, requires a person-to-person hand-off of all subjects, suspects, and distraught witnesses following investigative interviews. The individual's commander or designee must be physically present immediately following the interview to receive the hand-off, and this hand-off must be documented at the end of the testimony.

- Inquiry vs. Investigation:

- *Inquiry*: Determination of facts on matters not usually complex or serious. Inquiries may be handled through routine channels, and reports may be summarized.
- *Investigation*: Appropriate for serious, complex matters requiring a determination of extensive facts. Investigations conducted under the commander's inherent authority should include a written report. Normally, exhibits and sworn witness testimony support the facts that are determined.

Witnesses

- Must be advised of the nature of the investigation and, if applicable, their right to counsel
- Military members and Department of Defense (DoD) civilian employees have a duty to testify but may refuse to answer questions that are self-incriminating by invoking Article 31, UCMJ, or the Fifth Amendment rights
- As cases involving Air National Guard (ANG) and Reserve personnel are further complicated by the status of the witness at the time of the alleged offense and the time of the interview, it is important to determine a subject's or suspect's military or civilian status at the time of the questioning. This determination is important to assessing what rights advisement are required.
 - Members of the ANG and Reserve personnel, not in a duty status, cannot be required to participate in an interview
 - If a member of the Air Force Reserve refuses to participate in an interview while in a non-duty status, the IO may request that the owning commander place the witness in a duty status (i.e., place the witness on orders) and order the witness to testify
- Weingarten Rights for civilian employees may apply. For more information, see Chapter 15, Civilian Personnel and Federal Labor Law.
- IOs have no authority to grant express promises of confidentiality to subjects, suspects, complainants, or witnesses

REFERENCES

Freedom of Information Act, 5 U.S.C. § 552 Privacy Act, 5 U.S.C. § 552a

Military Whistleblower Protection Act, 10 U.S.C. § 1034

NLRB v. Weingarten, 420 U.S. 251 (1975)

AFI 33-332, *Air Force Privacy and Civil Liberties Program* (10 March 2020), with Corrective Actions, 12 May 2020

AFI 71-101, Volume 1, *Criminal Investigations Program* (1 July 2019)

AFI 71-101, Volume 2, *Protective Service Matters* (21 May 2019)

AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018), incorporating Change 1, 30 September 2020

Chief of Staff of the Air Force Memorandum, *Policy for Investigative Interviews* (26 November 2002)

The Secretary of the Air Force Office of the Inspector General Complaint Resolutions Directorate, Commander Directed Investigation (CDI) Guide (1 June 2018)

The Secretary of the Air Force Office of the Inspector General Complaint Resolutions Directorate, JAG Guide to IG Investigations (April 2019)

FLYING EVALUATION BOARD (FEB)

Aircrew members have an obligation to maintain professional standards. When performance of rated duty becomes questionable, a flying evaluation board (FEB) may be convened. This applies to rated officers, Career Enlisted Aviators (CEAs), non-rated officers, enlisted aircrew members and civilian government employees only. FEBs are administrative, fact-finding proceedings conducted to ensure information relevant to an aircrew member's aviation and professional qualification is reviewed and discussed in a fair and impartial manner. The proceedings are not adversarial and are closed to the public. FEBs are not a substitute for disciplinary or other administrative action.

Reasons to Convene a Flying Evaluation Board

- Suspension or disqualification from aviation service for more than eight years
- Lack of proficiency (unless enrolled in a formal flying training program)
- Failure to meet training standards while enrolled in a U.S. Air Force formal flying training course
- Lack of judgment in performing aircrew duties
- Failure to meet ground/flying training or annual health assessment requirements
- Intentional violation of aviation instructions or procedures
- Aircrew member exhibits habits, traits of character, or personality characteristics that make it undesirable to continue using the aircrew member in flying duties

Composition of a Flying Evaluation Board

- A flying unit commander (wing or comparable level) normally convenes an FEB
- Three rated voting members, qualified for aviation service in an active aviation service code (ASC) and senior in rank to the respondent, will be appointed and will constitute a quorum
 - Voting members should be in the same aircrew specialty (e.g., pilot, navigator, or flight engineer) as the respondent
 - To the greatest extent possible, at least one voting member should have the same primary duty AFSC as the respondent
- One additional aircrew member is appointed to act as a nonvoting recorder. A judge advocate may advise the recorder but shall not be appointed as an assistant recorder.
- A recorder prepares the case by presenting the evidence and examining the witnesses in a non-adversarial manner
- The senior board member is a voting member and final authority regarding conduct at the board
- Do not appoint the convening authority as a member of the board
- A judge advocate may be appointed as a nonvoting legal advisor to advise on procedural matters and ensure a fair hearing. If appointed, the judge advocate may not be present during closed sessions.
- Do not appoint enlisted members to FEBs convened for officers, or officers to FEBs convened for enlisted members. This includes the recorder position.
- A flight surgeon may be appointed as a nonvoting member when a medical problem may be a significant contributing factor in the case

Flying Evaluation Board Procedures and Guidelines

- Notify the respondent in writing
 - Notification letter contains the reasons for the FEB (including the basis for convening the board and all allegations), when and where the board will meet, witnesses to be called, and rights of the respondent.
 - The respondent must reply within 48 hours (two duty days)
 - Normally, convene the board within 30 days after the convening authority appoints the board
- Respondent may submit a request for voluntary disqualification from aviation service in lieu of the FEB (also known as a VILO) within five calendar days of receiving the FEB notification letter. Should such request be submitted, FEB action is suspended until the MAJCOM acts on the VILO request.
- Respondent may also request a waiver of FEB to return to previously qualified aircraft if enrolled in flying training
 - FEB waiver process is not an appropriate means to disqualify a member
 - Forward FEB waiver requests through command channels to the MAJCOM Aircrew Operations and Training Division (A3T) for final approval
 - If there is any doubt regarding potential for continued aviation service, direct an FEB

Flying Evaluation Boards Involving Reserve Aircrew Member

- Pursuant to AFMAN 11-402, *Aviation and Parachutist Service*, if an aircrew member belonging to the Air Force Reserve requires an FEB during a formal flying training course with an active duty Department of the Air Force unit, the MAJCOM/A3T will appoint a convening authority for an FEB at the base of training. In these situations, one of the board members must be a rated officer (as appropriate) in the Air Force Reserve or a member of the Air National Guard (ANG), preferably from the individual's home unit.

Rights of the Respondent at a Flying Evaluation Board

- Assigned military counsel of his/her own choosing (if available) or civilian counsel (at respondent's expense)
- Informed in writing of the specific reasons for convening the board
- Review all evidence and documents to be submitted to the board by the recorder (before convening the board)
- Challenge voting members for cause
- Cross-examine witnesses called by the board, call witnesses, and present evidence. The recorder arranges for military witnesses.
 - Although civilian witnesses may appear, an FEB cannot compel their attendance. Consult with the servicing staff judge advocate (SJA) concerning the procedures for requesting the presence of civilian Department of Defense (DoD) employees.
- Testify personally and submit a written brief. Respondent may not be compelled to testify.

Rules of Evidence

- An FEB is not bound by formal rules of evidence prescribed for courts-martial. However, observing these rules promotes orderly procedures and a thorough investigation.
- The decision about the authenticity of documents rests with the senior board member

Findings and Recommendations

- Made in closed session by voting members only
- Each finding must be supported by a preponderance of the evidence
- Findings must specifically include comment on each allegation or point in question
- Recommendations must be consistent with the findings and generally only address qualification for aviation service (i.e., remain qualified or be disqualified)
 - If the officer holds more than one aviation qualification, the FEB must make a recommendation as to both qualifications
 - If the FEB recommends disqualification, it may also recommend whether the officer should be prohibited from wearing the associated aviation badge
- A minority report is appropriate if there is a disagreement among the voting members

Review Process

- The convening authority's SJA reviews for legal sufficiency. This review is limited to sufficiency of the evidence and compliance with procedural requirements.
- The convening authority adds comments and recommendations, but must explain any recommendations that are contrary to those of the FEB
- The convening authority or higher reviewer may reconvene the FEB or order a new board
- The MAJCOM/A3T makes the final determination in all FEB cases convened at the MAJCOM-level or below

REFERENCE

AFMAN 11-402, *Aviation and Parachutist Service* (24 January 2019), including AFMAN11-402_AFGM2021-01 (29 January 2021)

COMMERCIAL ACTIVITIES

Department of Defense Commercial Sponsorship Program

- Commercial sponsorship is a Department of Defense (DoD) program that allows commercial enterprises to provide support to morale, welfare, or recreation (MWR) programs in exchange for promotional recognition and access to the Department of the Air Force market for a limited period of time. Such sponsorship helps finance enhancements for MWR elements of Services events, activities, and programs.
- There must be one or more bona fide MWR program events for sponsorship to apply
- Membership drives over extended periods can be treated as events for sponsor support and recognition purposes; however, sponsor displays can only be authorized at specific events during the drive
- MWR events appropriate for commercial sponsorship do not include normal day-to-day MWR management and overhead
- Only a Services MWR program may utilize commercial sponsorship
 - Other Air Force and Space Force organizations, private organizations, or unofficial activities are neither authorized to use commercial sponsorship to offset program or activity expenses nor partner with an MWR program to gain access to sponsorship benefits
- Installation commanders control the commercial sponsorship program at base level and approve/disapprove sponsorships worth \$5,000 or less (or other values as delegated by the major command)
 - Installation commanders may delegate approval authority of sponsorships and donations valued up to \$5,000 to the MSG/CC or FSS/CC or director

Unsolicited Commercial Sponsorship

- Unsolicited commercial sponsorship must be entirely initiated by the prospective sponsors or their representatives
- Force Support Squadron (FSS) activities may generate sponsor awareness and interest by publishing brochures and leaflets, placing ads in newspapers and magazines, or issuing public affairs-like news releases about the existence and availability of the program. They may also send nonspecific letters as follow-ups to general advertisements.
- Air Force and Space Force personnel may not provide information about specific needs of the Services MWR program to “encourage” offers of unsolicited sponsorship
- The prospective company and the Department of the Air Force will enter into a commercial sponsorship agreement (see AFI 34-108, *Commercial Sponsorship and Sale of Advertising*, Attachment 2)

Solicited Commercial Sponsorship

- Commercial sponsorship “refers to the act of a civilian enterprise providing support to help finance or provide enhancements for MWR elements of Services activities, events, and programs in exchange for promotional consideration and access to the Department of the Air Force market for a limited period of time”
- The solicited commercial sponsorship program is the only authorized process for soliciting support for FSS activities, events, or programs defined as MWR

- Other sections of FSS as well as other Air Force and Space Force organizations, units, private organizations, or unofficial activities or organizations are not authorized to use commercial sponsorship nor may they partner with an MWR program to gain access to sponsorship benefits
- The prospective sponsor and the Department of the Air Force will enter into a commercial sponsorship agreement (see AFI 34-108, Attachment 2)
- AFI 34-108 dictates that solicitations are part of the procurement process. As such, they must be done competitively and sent to the maximum number of potential sponsors in a specific product category (except alcohol related companies or defense contractors) after an initial solicitation announcement has been made.
 - The solicitation should inform the maximum number of potential sponsors, announced in one or more of the following: Fed Biz Opps, local newspapers, Chamber of Commerce newsletters, or other appropriate business community publications
 - Sponsorship may not be solicited from alcohol companies, or military systems divisions of defense contractors
 - However, unsolicited sponsorship from them may be accepted when approved at the discretion of the commanding authority (i.e., the commanding authority at the installation would be the installation commander)
 - Alcohol company/manufacturer sponsors must also provide a “responsible use” campaign logo/message to be included in all promotional materials and in banner form at the event site
 - No solicited or unsolicited commercial sponsorship may be accepted from tobacco and marijuana/cannabis manufacturing or distribution companies

On-Base Commercial Solicitation

- On-base solicitation is a privilege, not a right, granted at the discretion of the installation commander. Personal commercial solicitation on an installation will be permitted only if the following requirements are met:
 - The solicitor is duly licensed under applicable laws
 - The installation commander permits it
 - A specific appointment has been made with the individual concerned and conducted in family quarters or other areas designated by the installation commander

Sponsor Recognition

- All sponsor recognition must be tied to an MWR activity, event, or program
 - Post-event recognition will be limited to “Thank you for your support” in ads, monthly publications, websites, etc.
 - Recognition for sponsors at places and times unrelated to the activity, event, or program is prohibited
- Sponsorship recognition is limited to the sponsor’s name, logo, and/or a brief slogan. Materials may be displayed in appropriate FSS facilities. Materials may also be displayed in AAFES, Defense Commissary Agency (DeCA), and other appropriate on-installation locations with the approval and coordination of AAFES, DeCA, or other appropriate officials.

- The display time for such materials is determined by the length of the event, program, or activity, the value of sponsorship, and the judgment of the entities
- Sponsors may provide event posters and banners identifying the sponsor or its products or services. While all commercial sponsorship signs, banners, etc., must contain disclaimers, normal concession type stands and distribution equipment used by the commercial sponsor do not need disclaimers when they identify the sponsor or its products (e.g., "Brand X Cola") on the dispenser for cola products.
- Housing occupants may operate limited business enterprises while living in base housing limited to the sale of products, minor repair service on small items, limited manufacturing of items or tutoring
 - Members must request permission in writing to conduct the commercial activity from the housing office
 - Occupants must meet local government licensing requirements, agreements, and host country business practices before requesting approval to operate a private business

Prohibited On-Base Commercial Solicitation

- Certain solicitation practices are prohibited on military bases, including, but not limited to:
 - Soliciting personnel who are on-duty
 - Soliciting any kind of mass audience, e.g., commanders call or guard mount
 - Soliciting in housing areas without an appointment
 - Soliciting door-to-door
 - Implying DoD sponsorship or sanction
 - Soliciting members junior in grade
 - Procuring or supplying roster listings of DoD personnel
 - Use of official ID cards by active duty members, retirees, or reservists to gain access for soliciting

Games of Chance

- Bingo and Monte Carlo (Las Vegas) events are authorized in accordance with Enclosure 3 of DODI 1015.10, Military Morale, Welfare, and Recreation (MWR) Programs. However, games of chance must not otherwise violate local civilian laws. International agreements apply overseas.
- Cash prizes may be awarded for bingo. Play in bingo programs should be limited to eligible patrons, their family members, and guests.
- Only non-monetary prizes may be awarded for Monte Carlo events. Play in Monte Carlo events should be limited to club members and their adult family members, members of other clubs exercising reciprocal privileges and their adult family members, and adult guests.
 - Once a participant purchases a money substitute for a Monte Carlo event, no reimbursement can be made for any unused portion, and money substitutes may not be used to buy resale items, including food and beverages

Raffles

- Installation-recognized Private Organizations may hold occasional and infrequent raffles which must be approved in advance by the installation commander, with the staff judge advocate (SJA)'s advice. Such raffles count towards the Private Organization's allowable limit of three on base fundraisers per quarter. Raffles must not otherwise violate local civilian laws.
 - Raffle prizes cannot be strictly monetary in nature

REFERENCES

DoDI 1000.15, *Procedures and Support for Non-Federal Entities Authorized to Operate on DoD Installations* (24 October 2008)

DoDI 1015.10, *Military Morale, Welfare, and Recreation (MWR) Programs* (July 6, 2009), incorporating Change 1, 6 May 2011

DoDI 1344.07, *Personal Commercial Solicitation on DoD Installations* (30 March 2006)
DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

AFI 32-6000, *Housing Management* (18 March 2020)

AFI 32-6001, *Family Housing Management* (21 August 2006), incorporating through Change 5, 3 September 2015, with corrective actions applied 31 May 2016, including AFI32-6001_AFGM2019-01, 15 October 2019

AFI 34-101, *Air Force Morale, Welfare, and Recreation (MWR) Programs and Use Eligibility* (16 April 2019)

AFI 34-108, *Commercial Sponsorship and Sale of Advertising* (21 August 2018)

AFI 34-219, *Alcoholic Beverage Program* (30 April 2019), including AFI34-219_AFGM2021-01, 3 February 2021

AFI 34-223, *Private Organizations Program* (13 December 2018)

AFI 36-3101, *Fundraising* (9 October 2018)

RAFFLES

Generally, the Joint Ethics Regulation (JER) prohibits raffles and other forms of gambling on government property or while on official duty. This includes the Pentagon, Navy Annex, or General Services Administration (GSA) leased or owned buildings under 32 C.F.R. 234.16 and 41 C.F.R. 102-74.395.

- Officially recognized private organizations, as defined in AFI 34-223, *Private Organizations Program*, may engage in raffles if they meet the requirements outlined below and in the AFI
 - Unit unofficial activities are not authorized to conduct raffles
- All Private Organization Raffles Must:
 - Not duplicate or compete with activities of the Army and Air Force Exchange Service (AAFES) or Service Nonappropriated Funds Instrumentalities (NAFIs)
 - Not directly solicit funds for their organization on base
 - Not be co-sponsored by the Department of the Air Force
 - Not use the Department of Defense (DoD) Moral, Welfare, Recreation (MWR) commercial sponsorship program
 - Not give the appearance of installation endorsement or special treatment to the donors/givers involved
 - Be held to support the private organization's routine operations or for the direct benefit of DoD personnel or their family members
 - Be reviewed by the staff judge advocate (SJA)
 - Comply with the law of the city, county, state, or country in which the installation is located and comply with any applicable requirements of such laws
 - Should be used to support the private organization's normal operations and cannot be used to fund a donation to an outside charitable cause or organization (exception for raffles where 100% of the proceeds benefit the Air Force Assistance Fund)
 - Must identify the purpose of the funds raised and the intended use of the proceeds
 - Must not be officially endorsed or supported except as permitted by Sections 3-210 and 3-211 of the JER
 - Not be conducted in the workplace or in uniform
 - Not be conducted by military members or civilian employees on duty time
 - Not be conducted on the Pentagon reservation
 - If on the installation, not be conducted strictly for a monetary prize
 - Cannot raffle off alcoholic beverages except during off base events and then only if in compliance with state and local laws
- Raffles are not permitted as part of the Combined Federal Campaign
- Raffles may be utilized for the benefit of the Air Force Assistance Fund (AFAF) if 100% of the proceeds are donated to AFAF

REFERENCES

32 C.F.R. § 234.16 (2013)

41 C.F.R. § 102-74.395 (2019)

DoD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

DoD Standards of Conduct Office Advisory No. 10-06, *2010 Combined Federal Campaign* (9 September 2010)

AFI 34-223, *Private Organizations Program* (13 December 2018)

OFF-LIMITS ESTABLISHMENTS

The establishment of off-limits areas is a function of command. It may be used by installation commanders to help maintain discipline, health, morale, safety, and welfare of service members. The establishment of off-limits areas is also intended to prevent service members from being exposed to or victimized by crime-conducive conditions. Armed Forces Disciplinary Control Boards (AFDCBs) advise and make recommendations to commanders on matters including establishment of off-limits areas.

Armed Forces Disciplinary Control Boards

- AFDCBs are established under the provisions of AFI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations*
 - AFDCBs may be local or regional; boards must meet quarterly
 - AFDCBs may recommend the installation commander place a civilian establishment or area off-limits to military members
 - The AFDCB is usually composed of a president and voting members, appointed by the commander, and representatives from various base functional areas, such as law enforcement, staff judge advocate (SJA), equal opportunity, public affairs, chaplains, consumer affairs, and medical, health, or environmental protection
- To place an establishment off-limits, the AFDCB normally must:
 - Notify the proprietor of the offending establishment, in writing, of the alleged condition or situation requiring corrective action
 - Specify in the notice a reasonable time for the condition or situation to be corrected
 - Provide the proprietor the opportunity to present any relevant information to the board
- If the AFDCB recommends an establishment be placed off-limits, the installation commander makes the final decision
 - A decision to place an establishment off-limits may be appealed to the next higher commander after exhausting any local appeal rights
 - The establishment remains off-limits until the decision is overturned or the commander determines adequate corrective action has been taken

Emergency Situations

- In emergency situations, commanders may declare establishments or areas temporarily off-limits to personnel of their respective commands. Follow-up action must be taken by AFDCBs as a first priority.

Commander Disciplinary Options

- Members who enter off-limits areas or establishments are subject to UCMJ action
 - Family members of service members and others associated with the Service or installation should be made aware of off-limits restrictions
- Do not post off limits signs or notices in the United States on private property
- In areas outside of the continental United States, off-limits and other AFDCB procedures must be consistent with existing status of forces agreements

REFERENCE

AFI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations* (27 July 2006), certified current 5 July 2018

UNOFFICIAL ACTIVITIES/UNIT SOCIAL FUNDS

- Unit social funds, coffee/flower funds, booster clubs, and similarly named unit-controlled unofficial activities are acceptable when determined to be an unofficial activity with limited assets
 - Assets may not exceed a monthly average of \$1,000 over a 3-month period. Unofficial activities may temporarily exceed these limits if the substantial majority (>75%) of its raised funds are to be expended within a six-month time period on a unit social event (e.g., holiday party).
 - The \$1,000 average monthly limit may be increased by \$100 for every 50 unit members over 300 members, to a maximum of \$5,000 monthly average
 - Inventory of unit memorabilia items for sale are not counted towards the \$1000 limit
 - When assets exceed the above figure, the unofficial activity must either become a private organization, discontinue its operations, or reduce its assets below the asset threshold
 - Unofficial activities will:
 - Maintain a two-person accountability system for all cash transactions; and
 - Submit a basic annual financial report to the unit commander detailing income and expenditures throughout the year
- Installation and unit commanders must carefully review the status of all such unofficial activities operating on their installation and ensure their compliance with all applicable rules and regulations
- Such unofficial activities are not meant to become permanent “slush funds”
 - Intended to allow group monetary collections for social events (e.g., holiday parties and unit picnics)
 - May also be used to collect “landing fees” (volunteer contribution of pro rata personal funds) to pay for refreshments and/or meals and unit-hosted conferences and symposia
 - Installation and unit commanders may maintain unofficial activity checking accounts year-round, but the permanent account balance should ideally be the minimum necessary to keep the account open per the financial institution’s rules
- No such fund can duplicate or compete with an installation nonappropriated fund revenue-generating activity
- Unofficial activities may not engage in frequent or continuous resale activities
 - Unit commanders must make a tactical decision whether or not to transition their unofficial activities to installation-recognized private organizations (POs)
 - POs are subject to lawsuits and installation commanders may require private organizations to purchase liability insurance in an amount adequate to cover potential liability arising from their activities. In addition, individual members of the unit/squadron could incur personal liability if not insured. Furthermore, POs events, generally, may not advertise through official communication systems (like those unofficial activities may use). However, unlike unofficial activities, POs have much broader latitude to raise funds, both on and off base.

- Unofficial activities must comply with all federal, state, and local laws governing such activities, including federal tax laws
- Unofficial activities may not sell alcoholic beverages, solicit funds, operate amusement or slot machines, or conduct games of chance, lotteries, raffles, or other gambling-type activities

REFERENCES

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

AFI 34-223, *Private Organizations Program* (13 December 2018)

AFI 36-3101, *Fundraising* (9 October 2018)

ACCEPTANCE OF VOLUNTEER SERVICES

Officers and employees of the federal government are restricted in their ability to accept voluntary (i.e., gratuitous) services, except in emergencies involving the safety of human life or the protection of property

- Acceptance of gratuitous services (when the provider agrees in writing and in advance to waive any right to compensation) is permissible
- Acceptance of gratuitous services may pose other issues, such as conflicts of interest, liability for damages or injuries both to and by the provider, or the illegal augmentation of another appropriation
- Government employees may not waive their rights to statutory entitlements. This issue may arise in connection with civilian employees and uncompensated overtime.
- Seek the counsel of a staff judge advocate (SJA) any time free services are offered, unless you know they are specifically authorized by law

Types of Permissible Volunteer Service

- Military Services are specifically authorized by law to accept certain voluntary services, including medical, dental, legal, religious, family support, library, and morale, welfare, and recreation (MWR) services
- Volunteers providing services under authorized programs are considered federal employees only for purposes of compensation for work-related injuries, tort claims for damages or loss, maintenance of records, and conflicts of interest
 - The volunteer must have been acting within the scope of the accepted services
 - The volunteer will most likely be entitled to Department of Justice representation should he/she be named in an action filed under the Federal Tort Claims Act (FTCA)
 - A volunteer may not hold policy-making positions, supervise paid employees or military personnel, or perform inherently governmental functions, such as determining entitlements to benefits, authorizing expenditures of government funds, or deciding rights and responsibilities of any party under government requirements
 - Volunteers may be used to assist and augment the regularly funded workforce, but may not be used to displace paid employees or in lieu of filling authorized paid personnel positions
- Volunteers may be provided training related to their duties
- Volunteers may be provided official e-mail access using the Volunteer Logical Access Credential (VOLAC) program
- Volunteers may be provided access to Personally Protected Information (PII) if it is required for their duties and they are given proper training
- Properly licensed volunteers may use government motor vehicles (GMVs) if required for their duties
- Volunteers may be reimbursed for minor miscellaneous expenses they incur in the course of their duties
- Volunteers may use child care services in the installation Child Development Center (CDC), space permitting, during the period of their duties

- All volunteers must sign the DD Form 2793, *Volunteer Agreement for Appropriated Activities or Nonappropriated Fund Instrumentalities*
- Federal agencies are specifically authorized by law to accept voluntary services provided by student interns as part of an established educational program
- Volunteer legal assistance services may be accepted in accordance with 10 U.S.C. §1044.
- Military services are statutorily authorized to accept services of Red Cross volunteers
 - Pursuant to a memorandum of understanding between the DoD and the Red Cross, Red Cross volunteers are generally considered government employees for purposes of the protections of the FTCA when acting in the scope of the services accepted by the DoD
- Volunteers accepted per 10 U.S.C. § 1588 are also generally considered government employees for purposes of the protections of the FTCA when acting in the scope of the services accepted by the DoD

REFERENCES

Legal Assistance, 10 U.S.C. § 1044

Authority to Accept Certain Voluntary Services, 10 U.S.C. § 1588

Limitation on Voluntary Services, 31 U.S.C. § 1342

Federal Tort Claims Act, 28 U.S.C. § 1346(b)

DoDD 1000.26E, *Support for Non-Federal Entities Authorized to Operate on DoD Installations* (2 February 2007)

DoDI 1100.21, *Voluntary Services in the Department of Defense* (27 March 2019)

AFI 51-306, *Administrative Claims For and Against the Air Force* (14 January 2019), incorporating Change 2, 17 July 2020

Memorandum of Understanding between the United States Department of Defense and the American Red Cross (March 2009) located at https://www.jcs.mil/Portals/36/Documents/Doctrine/Interorganizational_Documents/mou_arc2009.pdf

DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities or Nonappropriated Fund Instrumentalities* (March 2018)

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CHAPTER TWELVE: THE AIR FORCE CLAIMS PROGRAM

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PERSONAL PROPERTY CLAIMS

The Military Personnel and Civilian Employees Claims Act, also known as the Personnel Claims Act (PCA), is a gratuitous payment statute. It does not provide insurance coverage and is not designed to make the United States a total insurer of the personal property of claimants. Payment does not depend on tort liability or government fault. Congress instead determined to lessen the hardships of military life by providing prompt and fair payment for certain types of property loss or damage, especially those caused by frequent moves. The Air Force and Space Force aim, within approved guidelines, to compensate active duty members and civilian employees for property loss or damage to the maximum extent possible.

Introduction

- The Air Force Claims Service Center (CSC), located at Wright-Patterson Air Force Base, Ohio, centrally adjudicates all personnel claims
- Under the PCA, the Air Force and Space Force may settle and pay claims for loss and damage of members' personal property when such loss or damage is "incident to service"
- Not all property claims are covered
- Covered claims generally fall into three categories:
 - Household goods (HHG) claims
 - Vehicle shipment (POV) claims
 - Other tangible personal property claims

Requirements under the Statute

- The loss or damage must be incident to the member's service
- The loss or damage cannot be recoverable through private insurance (limited exceptions apply)
- The claim must be substantiated
- The Air Force and Space Force must determine that the member's possession of the property was "reasonable or useful" under the circumstances
- The loss or damage must not have resulted from negligence of the claimant
 - Other than household goods claims paid under the full replacement value program described below, maximum payment is \$40,000, unless the claim arises from emergency evacuations or extraordinary circumstances in which cases the maximum payment is \$100,000

Processing Guidelines

- Full Replacement Value (FRV) Program:
 - FRV applies to household goods shipments picked up on or after 1 October 2007. Under this program, members may first claim full replacement value for damaged or lost household goods directly with the carrier.
 - If a member cannot reach an acceptable settlement with the carrier on certain items, the member can file a claim with the CSC for the disputed items only. Standard depreciation rules will apply. The CSC will assert an FRV claim against the carrier, and, if recovery is successful, will pass it on to the member.
 - If a member has a significant loss under FRV, they should be aware that the carrier's maximum liability is \$75,000 or \$6.00 times the net weight of the shipment. In other words, if the

member's shipment weighs 10,000 pounds, the carrier's maximum liability is \$60,000. The CSC can pay an additional \$40,000 at depreciated value.

- FRV Program Filing Deadlines (from date of delivery):

- The claimant files the "Notice of Loss/Damage After Delivery" in the Defense Personal Property System (DPS) Claims Module within 75 days, placing the carrier on notice that additional loss or damage has been detected after delivery
 - Shipments picked up on or after 15 May 2020 will have 180 days to file the Notice of Loss/Damage After Delivery in DPS
- This time limit may be extended for certain causes such as the member being on temporary duty (TDY) or hospitalized. The CSC will evaluate the cause and extend the deadline as appropriate.
- The claimant must file a claim directly with the carrier within nine months. If the claimant fails to file during this time, they may file the claim with the carrier or the CSC within two years, but standard depreciation rules will then apply.

- Defense Personal Property System (DPS):

- The DPS system phased in for household goods moves between November 2008 and summer 2011. Under this program, members file a claim in the DPS Claims Module.
- A claimant will file a "Loss/Damage Report After Delivery" within 75 days (this takes the place of the DD Form 1840R) online within the DPS claims module
 - Shipments picked up on or after 15 May 2020 will have 180 days to file the Notice of Loss/Damage After Delivery in DPS
 - If the member cannot file the "Loss/Damage Report After Delivery" due to computer or other technical issues, the member should contact the CSC for guidance
- Similar to FRV, the claimant must file a claim against the carrier in DPS within nine months. If the claimant is dissatisfied with the carrier's offer, he/she can transfer the items/file the claim with the CSC.

- Statute of Limitations and Other Important Time Periods:

- A claim for a sum certain must be presented by the member (or authorized agent with a power of attorney) within two years from the incident date or date of delivery in accordance with the PCA. FRV is only available if filed within nine months.
- The two year statute may be extended, for good cause, during time of war. The CSC will determine whether good cause exists to extend the timeline.
- Damage for privately owned vehicles (POVs) is noted on DD Form 788 at the port. If additional damage is discovered after leaving the Vehicle Processing Center (VPC), but within 48 hours of vehicle pickup, the member should contact the VPC and alert the VPC of the additional damage.

Proper Claimants

- Active duty Air Force and Space Force military personnel
- Retired or separated Air Force and Space Force military personnel who suffer loss or damage resulting from the last entitled storage or movement of their personal property
- Air Force and Space Force civilian employees paid from appropriated and nonappropriated funds. Claims filed by nonappropriated funds civilian employees are paid from nonappropriated funds.

- Civilian employees of the Defense Commissary Agency (DeCA) who work on an Air Force or Space Force installation
- Department of Defense (DoD) dependent school teachers and administrative personnel serviced by an Air Force or Space Force installation
- Air Force Reserve (AFR) and Air National Guard (ANG) personnel when performing federally-funded active duty, full-time ANG duty, inactive duty for training, and ANG technicians serving under 32 U.S.C. § 709
 - This guidance only covers claims made against ANG members arising out of some type of Title 10 or Title 32 federal military duty
 - This guidance does not cover claims for negligent activities of ANG members who are, at the time of the alleged negligence, in non-federally funded state service
 - For claims arising from activities of ANG members on state active duty, state law likely provides the exclusive remedy
- Air Force Reserve Officer Training Corps (ROTC) cadets traveling at government expense or on active duty summer training
- United States Air Force Academy cadets
- Survivor of a deceased proper claimant or authorized agent or legal representative of a proper claimant

Payable Claims

- For loss or damage in the following general categories:
 - Government-sponsored transportation or storage under orders
 - Examples include household goods and unaccompanied baggage shipments, shipped vehicles, mobile homes and contents in shipment, and, in some circumstances, personally procured moves (PPM), also known as do-it-yourself (DITY) moves, luggage and hand-carried property
 - At quarters and other authorized places
 - Examples include fire, explosion, hurricane, theft, and vandalism in continental United States (CONUS) base housing or at overseas quarters either on or off-base
 - Privately owned vehicles (POVs)
 - Examples include damage in shipment, theft or vandalism to parked cars, damage or loss during TDY where POV is authorized, and paint over-spray. Members should proceed to their local legal office as soon as possible to complete an inspection and have photos taken.
- **Uniform items damaged while performing normal duties are not payable**
 - Claims for damaged or missing uniforms are not paid automatically. All claims must be investigated and any payment must be supported by the facts contained in the claim file. There should be no negligence or lack of due care on the claimant's part, claimant must have done everything possible to "protect" the clothing items, and the damage cannot be a result of normal risks associated with daily work duties.
- To contact the CSC, call DSN 986-8044 or commercial toll free 1-877-754-1212 or via e-mail at AFCSC.JA@us.af.mil. To file a claim online, visit: <https://claims.jag.af.mil/>

REFERENCES

Military Personnel and Civilian Employees' Claims Act (Personnel Claims Act), 31 U.S.C. §§ 3701, 3721 32 U.S.C. § 709

DoDD 5515.10, *Settlement and Payment of Claims Under 31 U.S.C. 3701 and 3721, "The Military Personnel and Civilian Employees' Claims Act of 1964"* (24 September 2004), certified current 31 October 2006

AFI 51-306, *Administrative Claims for and Against the Air Force* (14 January 2019), incorporating Change 1, 17 July 2020

Air Force Claims Service Center, <https://claims.jag.af.mil/>

DISASTER CLAIMS

Disasters come in all shapes and sizes at installations around the globe. From hail storms, floods, fire, tornados, hurricanes, ice storms, and high wind events, the Air Force Claims Service Center (CSC) and base legal offices work together when a disaster strikes to ensure Airmen, Guardians, and their families receive compensation for lost and destroyed personal property that is lost incident to service. This guidance does not cover claims for negligent activities of Air National Guard (ANG) members who are, at the time of the alleged negligence, in non-federally funded state service. For claims arising from activities of ANG members on state active duty, state law likely provides the exclusive remedy. This guidance only covers claims made against ANG members arising out of some type of Title 10 or Title 32 federal military duty.

Disaster Claims Team

- A disaster claims team from AF/JA – Civil Law, Claims and Tort Litigation Division (JACC) is available to assist base legal offices in large disasters. The disaster claims team, along with reach-back support, or even on-site assistance from CSC personnel, will deploy to the disaster location at the request of the wing or installation commander.
- The CSC, with Defense Finance and Accounting Services (DFAS) support, can make emergency payments within 96 hours by electronic funds transfer (EFT). Alternatively, the CSC can provide the wing accounting liaison officer (ALO) an emergency funding document in order to make cash payments, if needed.
- If the claims team is deployed to the disaster location, CSC personnel, along with base legal personnel, will inspect and document damaged property, and assist Airmen, Guardians, and their families with filing claims. Claims must first be filed with any available insurance coverage. Claims filed against the Air Force and Space Force are secondary.
- Affected Airmen, Guardians, and their families have two years from the date of the disaster to file their claims with the Air Force or Space Force
- CSC Contact Information: DSN 986-8044, COMM 937-656-8044, toll free 1-877-754-1212 or via e-mail at AFCSC.JA@us.af.mil

REFERENCES

Military Personnel and Civilian Employees' Claims Act (Personnel Claims Act), 31 U.S.C. § 3721

DoDD 5515.10, *Settlement and Payment of Claims Under 31 U.S.C. 3701 and 3721*, "The Military Personnel and Civilian Employees' Claims Act of 1964" (24 September 2004), certified current 31 October 2006

Air Force Claims Service Center, <https://claims.jag.af.mil/>

TORT CLAIMS

Dependents, retirees, and nonaffiliated civilians may file claims related to accidents or injuries they have suffered. More recently, due to a new provision in Section 731 of the 2020 National Defense Authorization Act (NDAA), service members may file claims against the U.S. government for damages relating to the personal injury or death of a service member arising from medical malpractice that occurs in military treatment facilities. In those situations, commanders may inform claimants that it is their right to file a claim to seek compensation for their loss. Commanders should refer potential claimants to the servicing staff judge advocate's (SJA) office and should not make any promises or implications that their claim will be approved.

Introduction

- Under certain circumstances, federal law subjects the United States to liability for property damage, personal injuries, and death that result(s) directly from the negligent or wrongful acts/omissions of government personnel acting within the scope of their employment
- Federal law authorizes the United States to pay for property damage, personal injuries, and death that directly result(s) from "noncombat activities" of United States armed forces
- Normally, to receive compensation, an injured person or entity must present a signed written request for payment of a specific amount of money (claim) within two years of the accident or incident to the agency that created the loss, personal injury, or death
- In some cases, denial of a claim or failure to resolve a claim within six months after it is presented to the Air Force or Space Force creates a right to sue the United States in federal district court
- Installation legal offices work with AF/JA – Civil Law, Claims and Tort Litigation Division (JACC), to receive and process claims against the Air Force or Space Force and help defend the Air Force or Space Force when claims are litigated

Claims and Claimants

- Claims arising from alleged negligent or wrongful acts or omissions of government personnel while acting within the scope of their office or employment are tort claims
- Common tort claims include government motor vehicle (GMV)-privately owned vehicle (POV) accidents, slips and falls on base, barrier or bollard accidents, medical malpractice, aircraft accidents, or mishaps with rental cars while on temporary duty (TDY)
- Claimants may be individuals, organizations, or companies that have suffered loss because of alleged negligent or wrongful acts or omissions by government personnel acting within the scope of their employment
- Claimants may also be agents, legal representatives, or persons with subrogation rights of the injured party

Payable Claims

- Claim must demand a specific amount of money and be signed by claimant or authorized agent
- Claim must allege damage to real or personal property, personal injury, or death
- Damage must be a direct result of negligent or wrongful act or omission of government personnel acting within the scope of employment
- A negligent act occurs when a person's failure to exercise the degree of care considered reasonable under the circumstances results in an unintended injury to another party, as determined by the state law where the incident occurred

- Government personnel include Air Force and Space Force military and civilian employees, Civil Air Patrol members performing Air Force or Space Force assigned missions, and Air National Guard (ANG) military members when he or she is in a federal status
 - This guidance only covers claims made against ANG members arising out of some type of Title 10 or Title 32 federal military duty
 - This guidance does not cover claims for negligent activities of ANG members who are, at the time of the alleged negligence, in non-federally funded state service
 - For claims arising from activities of ANG members on state active duty, state law likely provides the exclusive remedy
- The base legal office determines, preliminarily, whether an employee acted within the **scope of employment** after reviewing relevant facts, circumstances, and applicable law
 - Ordinarily, a person is within the scope of employment if the actions in question were serving some governmental purpose when the negligent act or omission allegedly occurred
 - This assessment is not a line of duty question
- Generally, the extent of government liability is about the same as that of a private person
 - For claims arising in the United States and its territories, liability is determined based on the law of the state where the alleged negligent act or omission occurred
 - For claims arising in foreign countries, liability is based on legal standards controlled by United States military regulation or policy, or applicable international agreements
 - The principles of absolute or strict liability do not apply
- If the loss, injury, or death is the direct result of “noncombat activity,” the claim may be paid without regard to negligence or other fault
 - “Noncombat activity” is a term of art that means any activity, other than combat, war or armed conflict that is particularly military in character, has little parallel in civilian pursuits, and has been historically considered as furnishing the proper basis for claims. However, “noncombat activity” should not be interpreted as simply meaning, “not combat.”
 - Common “noncombat activities” include operation of military aircraft/spacecraft/missiles, practice bombing or firing of heavy guns and missiles, movement of tanks, and explosive ordnance disposal (EOD) operations
- If the claim is from a service member or the service member’s representative, alleging medical malpractice that occurred in a “covered military medical treatment facility,” the claim may be payable if the injury or death is the result of negligent care by a military, civilian Department of Defense (DoD) employee or personal services contractor
 - A “covered military medical treatment facility” is defined as medical centers, hospitals, and ambulatory care centers
 - Claims arising from medical care received in deployed environments and on ships are not payable

Claims Not Payable

- Claims specifically excluded by statute. These include, but are not limited to:
 - Damages, injuries, or death that stem from the performance of or failure to perform a discretionary function by a federal agency or government employee

- Intentional torts (acts that the person intends to commit) such as assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights
 - Claims may be payable with regards to acts or omissions of investigative or law enforcement officers of the United States Government arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution
- Government taking of air space over land
- Punitive damages
- Personal injury or death of a civilian employee of the United States sustained while in performance of his/her duty
 - Personal injury, death, or property damage of a military member incurred incident to service
 - Claims for injury or death from a military member or authorized representative arising out of the care the military member received in a covered military medical treatment facility is payable

Processing and Payment

- Installation legal office accepts, investigates, and adjudicates most tort claims alleging \$25,000 or less in losses, with the exception of personal injury and medical malpractice tort claims. Claims above \$25,000, for personal injury, at Continental United States (CONUS) locations are forwarded immediately to JACC. All claims arising out of medical malpractice CONUS and in Alaska and Hawaii, are forwarded immediately to JACC.
 - All installation level claims, other than those settled under the Federal Tort Claims Act (FTCA) for more than \$2,500, are paid from Air Force claims funds
 - If the installation legal office or JACC approves an FTCA claim for more than \$2,500, payment comes from the Judgment Fund Group of the Department of the Treasury
 - Installation legal office consults with JACC prior to adjudicating claims alleging:
 - Personal injury
 - Legal malpractice
 - Property damage caused by an Air Force or Space Force member driving a rental vehicle
 - Property damage that occurred in a navigable waterway (admiralty and maritime claims)
 - Property damage caused by activities of the Civil Air Patrol
 - Property damage or personal injury to wing commander, vice wing commander or their immediate family members
- JACC investigates and takes final action on all medical malpractice claims arising within the United States. At USAFE bases and at PACAF bases outside the 50 states, base legal offices investigate medical malpractice claims under the Military Claims Act (MCA) and forward the claims files to JACC with the full investigation and recommendation for final adjudication.
- If the installation legal office denies a claim, claimant may appeal or request reconsideration, depending on which statute dictates processing of the claim
 - Installation legal offices can grant an appeal or reconsideration request

- Installation legal offices must forward any appeal or reconsideration request it does not grant to JACC for final action
- CONUS installation legal offices accept claims alleging more than \$25,000 in damages or personal injury
 - Installation legal offices will appoint an attorney or paralegal to serve as the point of contact (POC) within the installation legal office to work with JACC to investigate the claim
 - In some cases, the installation POC will take a more proactive role in the adjudication process, to include legal research, drafting memoranda, and negotiating settlements, to provide training and increased experience for both attorneys and paralegals
- Outside the continental United States (OCONUS) installation legal offices accept, investigate, and may settle non-medical malpractice claims up to \$25,000. Those claims not settled for less than \$25,000 are forwarded to JACC with the full investigation and recommendation for final adjudication.
 - Before adjudicating a claim, OCONUS legal offices should ensure they have single-service claims responsibility within the country they are located. If not, forward claims to the appropriate military service for investigation and adjudication.
- In certain cases, claimant may sue the Department of the Air Force within six months after final action is taken on the claim
 - Final action is taken by mailing the denial of claim or, when applicable, denial of a reconsideration request
 - Six months of no action may be deemed a denial by the claimant and the claimant can file suit
 - Suit is in federal district court. Department of Justice (DOJ) defends the Air Force or Space Force in litigation. JACC works with the installation legal office to help DOJ defend litigation.
- Special procedures apply to claims arising in a foreign country. Installation legal offices coordinate with the Foreign Claims Branch of JACC when handling foreign and international claims.
- Claims from service members for medical malpractice, whether arising from care received in the U.S. or in a foreign country, are adjudicated under Section 2733a of the Military Claims Act. There is no judicial remedy, but the service member may appeal the decision.

REFERENCES

Military Claims Act, 10 U.S.C. § 2733

Medical Malpractice Claims by Members of the Uniformed Services, 10 U.S.C. § 2733a

Foreign Claims Act, 10 U.S.C. § 2734

International Agreement Claims Act, 10 U.S.C. §§ 2734(a), 2734(b)

National Guard Claims Act, 32 U.S.C. § 715

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401, 2671-2680

H.R.2500 – National Defense Authorization Act for Fiscal Year 2020, 116th Congress (2019-2020)

AFI 51-306, *Administrative Claims For and Against the Air Force* (14 January 2019), incorporating Change 2, 17 July 2020

AVIATION CLAIMS

- Aviation claims occur in a variety of ways, including claims arising from crashes, aircraft range operations, falling objects, jet blasts, low overflights and sonic booms. These claims can involve Regular Air Force or Space Force, Air Force Reserve (AFR), Air National Guard (ANG), Aero Club, and Civil Air Patrol (CAP) personnel and aircraft.
- If the claim arose from military flight activity, it may be payable under the “noncombat activity” provisions of the Military Claims Act (MCA) or the National Guard Claims Act (NGCA)
 - There is no requirement to show negligence in noncombat activity claims. Causation and damages are the only issues.
 - MCA/NGCA claimants may receive advance payments under certain circumstances, primarily for damage mitigation purposes in cases of urgent need
 - If the claim cannot be settled, the claimant may bring a lawsuit under the Federal Tort Claims Act (FTCA), unless otherwise exempted, but must prove negligence, causation, and damages
 - Base settlement authority is generally limited to \$25,000 for claims involving only property damage. Attachment 2 of AFI 51-306, *Administrative Claims For and Against the Air Force*, details settlement authorities.

Sonic Boom and Low Overflight Claims

- Sonic Boom Damage:
 - Overpressures based upon speed, altitude, maneuvers, and location of aircraft relative to a claimant’s property, in pounds per square feet, are used to determine whether claimed damage could have been caused by sonic boom
 - Sonic booms are not selective and may encompass an entire area. A sonic boom is unlikely to cause damage to a claimant’s home while having no effect on nearby properties.
 - Window glass, stucco, drywall, and bric-a-brac are generally the first items to be damaged. A sonic boom is unlikely to cause significant structural damage, such as cracked foundations or sidewalks, without also breaking windows, cracking drywall or stucco, or shaking bric-a-brac from shelves.
- Low Overflight Damage:
 - Noise alone generally does not cause damage to property
 - Noise may impact people’s health and may harm animals, such as by stampeding cattle and horses or startling chickens and other animals
 - Claims alleging loss of property value due to noise from repeated low overflights are not usually payable under any tort claims statute. The property owner’s remedy is generally a “takings” claim under the Fifth Amendment’s due process clause.

Aircraft Accident Claims

- ANG Claims:
 - Settlement authorities may settle claims for death, personal injury, or property damage arising out of the authorized noncombat activities of the ANG pursuant to the NGCA, 32 U.S.C. § 715
 - In adjudicating ANG claims, it is important to determine the status of crewmembers or ANG personnel involved in mishap

- Title 10 – federal active duty orders
- Title 32 – federally funded training orders (e.g., inactive duty training (IDT) or active duty training (ADT))
- State Active Duty – disaster response, riot control, or emergency situations
- The United States is only liable for negligence of ANG members performing federal duties under Title 10 or Title 32 at the time of the incident. The provisions do not apply when a member is performing duty for the state.
- ANG aviation claims can be adjudicated under the noncombat activity provisions of the MCA if the member was in Title 10 status, or the NGCA if the member was in Title 32 status
- AFR Claims:
 - Crewmembers have same status as Regular Air Force and Space Force personnel
 - AFR aviation claims can also be adjudicated under the noncombat activity provisions of the MCA, in addition to the FTCA
- Aero Club Claims:
 - Aero Clubs are recreational activities operated by installation Morale, Welfare, and Recreation (MWR) funds, which are nonappropriated fund instrumentalities (NAFIs) of the United States
 - The *Feres* Doctrine generally bars active duty, guard and reserve military members from receiving compensation under federal claims statutes for death or injuries arising out of their participation in Aero Club and other MWR NAFI activities. Such participation is deemed incident to their military service.
 - Similarly, the Federal Employees' Compensation Act (FECA) generally bars Air Force and Space Force civilian employees from receiving compensation under federal claims statutes for death or injuries arising from their participation in Aero Club activities
 - Third-party claims arising from the negligence of Aero Club employees or military members working at the Aero Club in their official capacity are cognizable under the FTCA
 - Aero Club claims under the FTCA are investigated and adjudicated by the same settlement authorities as other FTCA claims. However, settlement of Aero Club claims are paid from nonappropriated funds administered by the Air Force Claims Services Center (CSC) located at Joint Base San Antonio-Lackland, Texas.
- CAP Claims:
 - CAP is a federally supported, congressionally chartered, nonprofit civilian corporation, and the volunteer civilian auxiliary of the Air Force. Its mission is to provide aerospace education and training to its senior and cadet members, provide volunteer emergency services, and promote civil aviation in the public sector.
 - The Air Force is authorized to use the services of the CAP in fulfilling certain noncombat programs and missions of the Air Force that have been approved as Air Force Assigned Missions (AFAMs) by an appropriate Air Force authority. AFAM approval authorities are clearly laid out in AFI 10-2701 *Organization and Function of the Civil Air Patrol*.
 - Typical AFAMs include support of homeland security, search and rescue, disaster relief, and counter-narcotics reconnaissance flights
 - CAP is an instrumentality of the United States when performing an AFAM

- Third-party claims arising out of activities of CAP while performing AFAMs are cognizable under the FTCA
- Senior CAP members or CAP cadets (18 years or older) are covered under FECA for their death or injuries incurred while in the performance of an AFAM
- The United States is not liable for third party claims arising out of CAP corporate activities or for claims for the use of privately owned property that CAP or its members use during AFAMs

REFERENCES

Federal Employees' Compensation Act, 5 U.S.C. §§ 8101 *et seq.*

Military Claims Act, 10 U.S.C. § 2733

Medical Malpractice Claims by Members of the Uniformed Services, 10 U.S.C. § 2733a

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680

National Guard Claims Act, 32 U.S.C. § 715

Feres v. United States, 340 U.S. 135 (1950)

AFI 51-306, *Administrative Claims For and Against the Air Force* (14 January 2019), incorporating Change 2, 17 July 2020

AFI 10-2701, *Organization and Function of the Civil Air Patrol* (6 August 2018), including AFI10-2701_AFGM2021-01, 5 January 2021

FOREIGN AND INTERNATIONAL CLAIMS

Single Service Claims Responsibility

- DoDI 5515.08, *Assignment of Claims Responsibility*, assigns certain countries to each military department (Army, Navy, Air Force, and Space Force) and makes the military departments responsible for final action on tort claims arising within their assigned countries. This instruction applies to numerous claims statutes, including the Foreign Claims Act (FCA), International Agreement Claims Act (IACA), Military Claims Act (MCA), Use of Government Property Claims Act (UGPCA), and Advance Payments Act (APA).
- Naval Forces Afloat Exception: Naval forces afloat visiting foreign ports may settle claims arising outside the scope of duty for under \$2,500 without regard to single service assignment
- Not all countries are assigned under DoDI 5515.08. Claims arising in unassigned countries will be adjudicated by the command responsible for generating the claim. If the command is joint, the claim should be adjudicated by the service component command whose personnel allegedly caused the claim.
- Claims in foreign countries are settled under the regulations of the service having single service claims responsibility
- The Department of Defense General Counsel (DoD/GC) can change assignments by updating DoDI 5515.08 or by interim letter
- This guidance does not cover claims for negligent activities of Air National Guard (ANG) members who are, at the time of the alleged negligence, in non-federally funded state service. For claims arising from activities of ANG members on state active duty, state law likely provides the exclusive remedy. This guidance only covers claims made against ANG members arising out of some type of Title 10 or Title 32 federal military duty.

International Agreement Claims Act (IACA) – U.S. Military in Foreign Countries

- The International Agreement Claims Act, 10 U.S.C. § 2734a, applies to acts and omissions of U.S. forces in foreign countries when the United States has a status of forces agreement (SOFA) with a foreign government and the SOFA explicitly provides for both governments to share the cost of any claim payout
 - Under the NATO SOFA, “receiving State” is the state receiving visiting forces and “sending State” is the state sending forces
 - For NATO SOFA claims against U.S. personnel in foreign countries, the United States would be the sending state
- Claims are adjudicated and paid by the receiving state (host nation), which sends the United States a bill for its pro rata share of any claim payout
 - The host nation must adjudicate the claim applying the same statutes it would apply if its own military had caused the damage
 - The host nation statute of limitations applies to these claims
 - If the host nation pays attorney fees as part of the settlement, the United States is obligated to pay its percentage of those fees
 - Claims caused by U.S. enemy actions or actions of U.S. forces in combat are not payable
- The United States currently has cost-sharing SOFAs with NATO members, and many Partnership for Peace (PfP) countries, Portugal (for the Azores), Iceland, Japan, Korea, Australia, and Singapore

- NATO SOFA and PfP SOFA (latter incorporates NATO SOFA by reference) are reciprocal, which means they apply to tortious incidents in the territories of all parties to the agreement
- SOFAs with Iceland, Japan, Korea, Australia, as well as the Lajes Technical Agreement (for the Azores), are not reciprocal. They apply only to tortious incidents by U.S. personnel in these foreign countries.
- Singapore Counter Agreement is also not reciprocal. However, it applies solely to tortious incidents by Singaporean personnel in the United States.
- U.S. reimbursement percentage is usually 75 percent, but this percentage can vary if more than one nation is responsible for the damage, injury, or death, or if a different cost-sharing arrangement has been negotiated
- The United States can object to a bill for reimbursement if the host nation paid a claim not cognizable under the SOFA or the host nation did not adjudicate the claim under the laws that would apply to its own military

International Agreement Claims Act (IACA) – Foreign Personnel in the United States

- The International Agreement Claims Act, 10 U.S.C. § 2734b, applies to acts of foreign forces in the United States when the foreign country has a SOFA with the United States and the SOFA explicitly provides for both governments to share the cost of any claim payout
 - For NATO SOFA claims against foreign personnel in the United States, the United States would be the receiving state
- Claims are adjudicated and paid by the United States as the host nation, which sends the responsible foreign country a bill for its pro rata share of any claim payout. The Air Force and Space Force will investigate these claims to the extent they involve foreign military personnel or property involved in an Air Force or Space Force activity, but only the Army is authorized under DoDI 5515.08 to settle (pay or deny) these claims.
 - The United States will adjudicate the claim applying the same statutes it would apply if its own military had caused the damage
 - The United States statute of limitations applies to these claims
 - If the United States pays attorney fees as part of the settlement, the foreign country is obligated to pay its percentage of those fees
 - Claims caused by U.S. enemy actions are not payable
- Cost-sharing agreements with applicability in the United States include the NATO SOFA, PfP SOFA, and Singapore Counterpart Agreement
 - SOFAs with Japan, Korea, Australia, and the Azores are not reciprocal and apply only to tortious incidents arising in those countries
 - According to the United States Department of State, NATO SOFA applies to Alaska, but not Hawaii
 - Foreign government reimbursement percentage is usually 75 percent, but this percentage can vary if more than one nation is responsible for the damage, injury, or death, or if a different cost-sharing arrangement has been negotiated
- Responsible foreign government can object to a bill for reimbursement if the United States paid a claim not cognizable under the SOFA or the United States did not adjudicate the claim under the laws that would apply to its own military

- Immediately notify AF/JA – Civil Law, Claims and Tort Litigation Division (JACC), of any Air Force or Space Force related on-base or off-base incident involving foreign military personnel or property in the United States

Foreign Claims Act (FCA)

- The Foreign Claims Act (FCA), 10 U.S.C. § 2734, applies only to claims arising abroad where the IACA is not applicable. IACA takes precedence over FCA. The Secretary of the Air Force (SecAF) has promulgated AFI 51-306, *Administrative Claims For and Against the Air Force*, and 32 C.F.R. Part 842, Subpart E, as authorized by 10 U.S.C. § 2734, to implement Air Force and Space Force policy under the FCA.
 - Use IACA where SOFA cost-sharing exists and damages, injury, or death are caused in the performance of official duty, as understood by the United States and the foreign government
 - Use FCA where no SOFA cost-sharing exists or where damages, injury, or death arise outside the scope of employment
- Claimant must be a foreign inhabitant
 - U.S. military members, federal civilian employees, and dependents are not foreign inhabitants
- Claims personnel must be appointed a Foreign Claims Commission (FCC) in order to act on an FCA claim. AFI 51-306 governs appointments/delegations of FCA Settlement Authority (FCC authority)
- Two-year statute of limitations applies to FCA claims
- Damage, injury, or death must be either incident to a noncombat activity or caused (negligently or wrongfully) by a DoD military member or civilian employee
- Statutory exceptions to payment include claims by subrogees and acts of the United States in combat. However, a claim may be allowed if it arises from an accident or malfunction incident to operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat and occurring while preparing for, going to, or returning from a combat mission.
- Apply the law of the country where the incident occurs to the extent it does not conflict with 10 U.S.C. § 2734, AFI 51-306, or 32 C.F.R. Part 842. If conditions for payment exist, and no basis prohibits payment, payment may occur. All payments are *ex gratia* and remain within the discretion of SecAF.
- Claimants are paid in the currency of the country where the incident occurred unless JACC receives a compelling justification why payment should occur in some other foreign currency

Solatia

- Solatium payment is a nominal payment made immediately to a victim or victim's family to express sympathy. Paid with personal funds or command (O&M) funds, it is not compensation (thus not deducted from claim award). It is also not subject to single service claims responsibility. Immediately report to JACC any attempt to pay solatia in a country where solatia has not been explicitly authorized by U.S. military regulation, as proof of clear custom must be established to justify such payment.

REFERENCES

Military Claims Act, 10 U.S.C. § 2733

Foreign Claims Act, 10 U.S.C. § 2734

International Agreement Claims Act, 10 U.S.C. §§ 2734a, 2734b

Advance Payments Act, 10 U.S.C. § 2736

Use of Government Property Claims Act, 10 U.S.C. § 2737

DoDI 5515.08, *Assignment of Claims Responsibility* (30 August 2016)

DoDD 5515.3, *Settlement of Claims Under Sections 2733, 2734, 2734a, and 2734b of Title 10, United States Code* (27 September 2004), certified current 31 October 2006

32 C.F.R. Part 842, *Administrative Claims*

AFI 51-306, *Administrative Claims For and Against the Air Force* (14 January 2019), incorporating Change 2, 17 July 2020

PROPERTY DAMAGE TORT CLAIMS IN FAVOR OF THE UNITED STATES

The United States may assert and collect claims for damage to its property through someone's negligence or wrongful act. As a property owner, the Department of the Air Force is often the victim of a tort and has the right under the Federal Claims Collection Act, 31 U.S.C. §§ 3711-3719, to collect for tort damages. Claims on behalf of the United States for property damage by a tortfeasor require the base to be proactive and aggressively look for these claims, which are known as "G" claims or government claims. This does **NOT** include medical cost reimbursement claims.

Assertable Claims

- Claims personnel may assert claims against a tortfeasor for loss or damage to government property when:
 - The loss or damage to government property is for \$100 or more. If the loss or damage is less than \$100, assert the claim if it can be collected easily.
 - The loss or damage is based on a contract and the contracting officer does not intend to assert a claim under the contract. Document the contracting officer's decision not to assert a claim for the file.
 - The claim arises from the same incident as a medical cost reimbursement claim. Process the two claims separately but coordinate on the investigations of both claims.
 - The tortfeasor or his insurer presents a claim against the government arising from the same incident (i.e., counterclaims). Coordinate the processing of both the pro-government and anti-government tort claims together.
 - The claim is based on products liability theory of recovery. Due to the unique nature of product liability issues and claims litigation, obtain approval from AF/JA – Civil Law, Claims and Tort Litigation Division (JACC) before asserting.

Nonassertable Claims

- Claims personnel do not assert a claim for loss or damage of government property in these instances:
 - For reimbursement against military or civilian employees for claims paid by the United States due to that employee's negligence
 - For loss or damage that a nonappropriated fund instrumentality (NAFI) employee causes to government property while on the job
 - If the loss or damage was caused by a government employee with accountability for the property under the reports of survey system

Statute of Limitations

- The United States must file a lawsuit for loss or damage of government property, based in tort, within **three years** after the date when a responsible official of the United States knew or reasonably should have known the material facts that resulted in the claimed loss
- Suits based in contract, upon state law, or upon some other legal theory, may have a different statute of limitations period

Collecting Claims

- Claims personnel collect tort claims in favor of the government
- The settlement authority may accept a third party's offer to repair or replace the damaged property to the satisfaction of the accountable property officer

- The Air Force or Space Force may offset a tort claim against an amount that it owes to the claimant
- When two or more tortfeasors are jointly and severally liable, settlement authorities may divide the payment between the tortfeasors
- A settlement authority may waive prejudgment interest where statute, contract, or regulation do not require it to encourage payment

Depositing Collections

- Claims personnel deposit collections
 - Deposit collections for loss, damage, or destruction to Air Force or Space Force family housing, caused by abuse or negligence, to the Department of Defense (DoD) military family housing management account
 - Deposit collections for loss, damage, or destruction to other real property to the appropriate funds account of the organization responsible for the repair, maintenance, or replacement of the real property. These funds may not be reused without their appropriation by Congress.
 - Deposit collections for loss, damage, or destruction to property of an Air Force or Space Force industrial fund or other revolving funds account to that account
 - Pay or deposit recoveries involving NAFI property to the appropriate NAFI
 - Deposit all other collections for which there is no statutory exception to the United States Treasury miscellaneous receipts account

REFERENCES

Damage to Real Property: Disposition of Amounts Recovered, 10 U.S.C. § 2782

Military Family Housing Management Account, 10 U.S.C. § 2831

Custodians of Money, 31 U.S.C. § 3302

Federal Claims Collection Act, 31 U.S.C. §§ 3711-3719

AFI 51-306, *Administrative Claims For and Against the Air Force* (14 January 2019), incorporating Change 2, 17 July 2020

MEDICAL COST REIMBURSEMENT CLAIMS

The Air Force and Space Force may recover the cost of providing medical care to active duty and retired military members and their beneficiaries who are injured as a result of tortious conduct of third parties under the Federal Medical Care Recovery Act (FMCRA) and for all care covered by a third party payer under the Coordination of Benefits statute (COB). The Air Force and Space Force may also recover pay given to an active duty member during a period of disability caused by tort under the FMCRA.

Federal Medical Care Recovery Act (FMCRA)

- Under this statute, the government's recovery is predicated on "circumstances creating tort liability"
 - Usually, the four common law elements of tortious conduct (duty, breach, causation, and damages) must be present before considering the assertion of a Medical Cost Reimbursement (MCR) claim under the FMCRA
 - The FMCRA applies even in no-fault jurisdictions. Where a system of tort liability has been replaced by a no-fault system, the government may pursue an FMCRA claim as a third party beneficiary.
 - At the same time, any defenses available under state law that may negate tort liability, such as contributory negligence, may be interposed to defeat the government's claim. However, state procedural defenses cannot be interposed to defeat the claim.
 - In general, a federal statute of limitation of three years applies
 - Since the United States has an independent statutory right of recovery, a release signed by the injured party is usually not effective in extinguishing the government's claim
- All successful collections for treatment provided by a military treatment facility (MTF) are deposited into the Operations and Maintenance (O&M) account of the MTF rendering treatment. Collections for active duty pay are deposited to the O&M account of the unit to which the disabled member was assigned at the time of the injury. Recoveries for treatment paid by the Defense Health Agency (DHA), previously known as TRICARE, are returned to the Defense Health Program.

Coordination of Benefits (COB) Claims

- Congress allows MTFs to pursue recoveries from statutorily defined plans
 - These include health insurance policies/plans, auto insurance providing for medical treatment, workers' compensation coverage, and similar plans, policies, and programs
 - The COB statute makes the United States a third-party beneficiary under such plans
 - In general, a federal statute of limitations of six years applies
- Successful recoveries of medical expenses are deposited directly into the treating MTF's O&M account
- Claims offices use COB as the primary statutory basis of recovery against various types of automobile insurance
- COB has been extended to allow recovery of payments made through DHA. Medical expenses paid for by DHA are deposited into the Defense Health Program.

Collection of Medical Cost Reimbursement Claims

- These claims are collected either by overseas base legal offices or one of eight Medical Cost Reimbursement Program (“MCRP”) regional offices within the United States. The MCRP offices are located at:
 - Joint Base McGuire-Dix-Lakehurst, New Jersey
 - Joint Base Langley-Eustis, Virginia
 - Eglin Air Force Base, Florida
 - Wright-Patterson Air Force Base, Ohio
 - Joint Base San Antonio-Lackland, Texas
 - Offutt Air Force Base, Nebraska
 - Nellis Air Force Base, Nevada
 - Travis Air Force Base, California
- Collections are generated from reports of injuries to covered personnel from MTFs, medical treatment providers, Security Forces (SFS) blotters, and notice from the injured party’s chain-of-command. If commanders become aware of an injury to an active duty or retired military member and/or their beneficiaries caused by a tortious act, the commander should promptly notify the base legal office for guidance on how to process this information and/or advise the injured party to contact the closest MCRP office.

REFERENCES

Collection from Third-Party Payers (also known as Coordination of Benefits), 10 U.S.C. § 1095

Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653

AFI 51-306, *Administrative Claims For and Against the Air Force* (14 January 2019), incorporating Change 2, 17 July 2020)

ARTICLE 139 CLAIMS

Under Article 139, Uniform Code of Military Justice (UCMJ), commanders may direct collection and pay a claim for property that military personnel willfully damage or wrongfully take, if the claim results from riotous, violent, or disorderly conduct.

Scope of Article 139 Claims

- Assertable Claims:

- *Property claims only*; not personal injury or wrongful death
- Must involve willful misconduct, not performance of legally authorized duties; and must arise from riotous, violent, or disorderly conduct, not conduct involving simple negligence or, for example, bad checks or private indebtedness
- Article 139 claims are entirely separate and distinct from disciplinary action taken under any other article of the UCMJ, or any other administrative action that may be appropriate

- Proper Claimant:

- Any individual, to include military and civilian, business entity, state, territory, local government, or nonprofit organization may file an Article 139 claim
- However, an appropriated fund (AF) or nonappropriated fund (NAF) instrumentality of the United States may not file an Article 139 claim

Procedures

- The claim must be submitted to an appropriate commander within 90 days of the date of the incident, unless the commander determines good cause for a delay
 - Examples of good cause for delay may include deployment, a claimant who does not know the identity of the tortfeasor, or the claimant's reasonable lack of knowledge of the ability to file an Article 139 claim
 - The claim should be submitted to the commander of the military organization or unit of the alleged offending member or members. However, it may be presented to the commander of the nearest military installation to be forwarded to the appropriate commander for jurisdiction.
 - Initially, the claim may be presented orally, but it must be written and state a sum certain before final action may be taken
- The claim is sent directly, or through channels, to the appointing commander, who is the officer exercising special court-martial convening authority over the offender. The appointing commander appoints a board of officers to investigate the claim.
 - A board of officers may consist of one to three commissioned officers
 - After evaluating all available evidence, which may include interviewing the individual against whom the claim was asserted (in accordance with the rights afforded by Article 31, UCMJ, and the right to counsel), the board:
 - Determines if the claim falls under Article 139, UCMJ
 - Identifies the offender(s)
 - Determines liability and damages

- The board may recommend:
 - Assessing damages against the identified service member (deducting from the assessment any voluntary or partial payments already made)
 - Assessing damages against members who were present during the incident, if authorities cannot individually identify the offenders
 - Disapproving the claim
- After the board completes its review, it forwards the claim to the staff judge advocate for a legal review prior to action by the appointing commander

Action by the Appointing Commander

- Determine if the claim falls under Article 139, UCMJ
- Assess an amount against each offender, but not more than the board's recommended amount
 - Cognizable claims in excess of \$5,000 must be approved by AF/JA – Civil Law, Claims and Tort Litigation Division (JACC) prior to payment
- Forward the board's report to the appropriate commander if it is determined that one or more offenders are in a different command, since only the commander of an offender may order payment of the claim under Article 139, UCMJ
- Direct the Defense Finance and Accounting Services (DFAS) office to withhold the specified amount from each offender's pay and to pay the claimant
- Notify the offender and claimant of the action taken

Appeal and Reconsideration

- The commander's action may not be appealed by the claimant or the offender
- The commander who originally ordered the assessment may reconsider and change the decision if the findings later prove to be wrong, even if the offender is no longer a member of that command
- A successor in command may change or cancel the assessment only on the basis of newly discovered evidence, fraud, or obvious error of law or fact

REFERENCES

UCMJ Art. 31

UCMJ Art. 139

AFI 51-306, *Administrative Claims for and Against the Air Force* (14 January 2019), incorporating Change 2, 17 July 2020

LIABILITY FOR DAMAGE TO RENTAL VEHICLES

Introduction

- Vehicles rented on government orders are for official use only
- The use of a rental vehicle on government orders for other than official purposes places a member at risk of personal liability for damages
- “Official Purposes” is a different standard than “scope of employment”
 - **“Official purposes”** is a standard in the Joint Travel Regulation (JTR) and is used to determine whether or not a renter will be reimbursed for damage to a rental vehicle
 - Official purposes include transportation to and from duty locations, lodgings, dining facilities, drugstores, barber shops, places of worship, dry cleaning establishments, and similar places required for the traveler’s subsistence, health, or comfort
 - **“Scope of employment”** is based on the law of the state in which the accident occurs and is the legal standard under the claims statutes that will be used to determine whether or not the United States will defend a renter in a lawsuit
 - Within NATO Status of Forces countries, there is yet a third standard, “in the performance of official duty,” which bears on both claims and foreign criminal jurisdiction questions
- Use must be reasonable, but even if reasonable, may still not be in scope of employment
- It is important for commanders to factor into rental car authorizations whether or not the member or employee has private automobile liability insurance that could be relied upon in the event the member or employee were in an accident and found to be outside the scope of employment
- When renting a vehicle pursuant to an authorization on orders, it is mandatory to obtain the rental vehicle through the commercial travel office (CTO)
 - Generally, CTO will reserve a vehicle from a company participating in the Defense Travel Management Office (DTMO) negotiated agreement
 - It is the United States Transportation Command (TRANSCOM) policy for CTOs to reserve a rental vehicle from a company that subscribes to the DTMO-negotiated agreement
 - Use of companies and rental car/truck locations participating in the DTMO agreement is encouraged because their government rate includes liability and vehicle loss and damage insurance coverage for the traveler and the government
 - Rental companies having a negotiated agreement with DTMO will be used, unless another rental company can provide better service at a lower cost and abides by the same rules/guidance contained in the DTMO-negotiated car/truck rental agreement
 - Government Administrative Rate Supplement (GARS): The GARS is a \$5 per day fee added by rental car/truck companies that are party to the DTMO Car Rental Agreement. GARS is reimbursable to the traveler as specified in the JTR.

DTMO Rental Vehicles Agreement

- Major rental car companies subscribe to a memorandum of understanding (MOU) with DTMO. The MOU sets rates and conditions of the rental.
- Names of companies participating in the rental car program, current maximum rates offered, and terms and conditions of the U.S. Government Rental Car Agreement, effective 17 March 2016, are published on the DTMO website at <https://www.defensetravel.dod.mil/site/rentalCar.cfm>

- Travel orders must reflect that a rental vehicle is authorized
- Agreement is not valid when using an International Merchant Purchase Authorization Card (IMPAC)
- Must rent from a participating company **AND** location. While most rental car companies subscribe to the agreement, a particular location may opt out.
- Rental agency should be notified of all persons who are going to be driving the rented vehicle
 - Rental agency cannot charge for the addition of other drivers. A contractor is not your “fellow employee” and may not drive a car you rent on official business.
- DTMO Car Rental Agreement: Applies to cars and mini-vans and is available at <https://www.defensetravel.dod.mil/Docs/CarRentalAgreement.pdf>
- DTMO Truck Rental Agreement:
 - Applies to cargo vans, pick-ups, utility, and straight trucks. Gross weight must not require a Class C driver’s license.
 - Available at <https://www.defensetravel.dod.mil/Docs/TruckRentalAgreement.pdf>
 - Trucks are not necessarily listed with the commercial travel office (CTO) — must call company or go to DTMO website: <https://www.defensetravel.dod.mil/site/rentalCar.cfm>
 - Driver must be 21 years old
 - Unlike cars, if a driver rents a different truck than one with DTMO rate, DTMO agreement does not apply
 - May apply to do-it-yourself (DITY) moves, but coverage under the agreement does not extend to spouse driving vehicle, nor to detours (e.g., driving out of the way to see parents)
 - Some states do not consider permanent change of station (PCS) moves to be in the scope of employment, so government would not defend member for negligence causing damage or injury to another

Liability for Damages to the Rental Vehicle and to Others

- Four Different Situations:
 - Rented on orders pursuant to DTMO agreement
 - Rented on orders not under DTMO agreement
 - Personal rental vehicle on official temporary duty (TDY)
 - Rented pursuant to umbrella contract
- Claims personnel do not pay claims for damage to rental vehicles rented on orders pursuant to DTMO agreement. Follow guidance below for each situation.

Rented on Orders Pursuant to DTMO Agreement

- The rental company assumes and bears the entire risk of loss of or damage to the rented vehicles up to the policy limits. Full comprehensive and collision coverage is in effect.
- Renter may be personally liable for loss or damage caused by a fellow government traveler in official travel status while acting outside the scope of their employment duties
 - *Example*: A unit sends five people TDY and authorizes one rental car. One member rents the vehicle and charges the rental on the member’s government travel card (GTC) (not the unit’s government purchase card (GPC)). Any of the five members are authorized drivers

while acting *within the scope of their employment duties*. But if one of the members takes the vehicle to a bar late at night, gets drunk, and crashes the car, that member would not be considered an authorized driver at the time of the accident.

- Negligence claims for personal injury or property damage against the driver by third parties are covered under the liability insurance provided by the rental car company, up to the policy limits. Under the current DTMO agreement, rental companies must have personal injury policy limits of at least \$100,000 per person/\$300,000 per occurrence and property damage limits of \$25,000 per occurrence. Regardless of fault, so long as the driver was within the scope of employment, the government will defend the driver in any civil lawsuit. Within the United States, the exclusive remedy is against the government — the driver cannot be held personally liable while he/she was within the scope of employment.

Rented on Orders, Not Under the DTMO Agreement

- For damage to rental vehicle, the government travel card currently carries collision coverage
 - The traveler must decline the rental car company's collision damage waiver insurance
 - Damage must be reported to the government travel card company immediately
 - Covers collision or rollover, theft and theft-related charges, malicious vandalism, windshield damage due to road debris, and loss of use and towing charges due to covered damage
 - Does not apply if the vehicle is:
 - Rented for more than 31 days
 - Used off-road
 - Driver is driving under the influence (DUI)
 - Damage results from hail, lightning, flood or other weather-related causes
 - Damage is from failure to protect the car (e.g., leaving the car running and unattended)
 - Does not apply to expensive, exotic, and antique autos; vans over eight passenger; trucks; motorcycles; limos; or recreational vehicles
 - If no travel charge card coverage, member usually pays the rental company and claims reimbursement on the travel voucher
 - Defense Finance and Accounting Service (DFAS) can also pay a rental company directly
 - Travel claim comes to the legal office for review
 - Payment for damage is from unit travel funds
- For damage to another vehicle, property, or personal injury, the claims office adjudicates
 - So long as the driver was in the scope of employment, the United States will defend the driver. Within the United States, the driver cannot be held personally liable if the accident occurred while he/she was within the scope of employment.

Personal Rental Vehicle on Official TDY

- For damage to rental vehicle, the driver is usually personally responsible
- For damage to another vehicle, property, or personal injury, the United States will defend the driver if driver is in the scope of employment
 - Within the United States, the driver cannot be held personally liable if the accident occurred while he/she was within the scope of employment

Rented Pursuant to Contract

- DTMO agreement not applicable unless made a part of the contract
- Will be subject to specific contractual provisions under Federal Acquisition Regulations (FAR). FAR clause 52.228-8 is required within the United States. Generally, the United States is liable for any damages to the rental vehicle except for wear and tear and loss or damage caused by the negligence of the contractor
- Along with typical contracts for fleet rentals, rental with a GTC is a government contract and not a rental between the traveler and the company
- Claims for damage to rental vehicles under contract are settled under contractual provisions as claims against the contract
- Unlike vehicles rented on a GTC, a report of survey may be required for damage to a vehicle rented under a government contract
- For damages to another vehicle or property, the claims office adjudicates as a tort claim. So long as the driver is within the scope of employment, the government will defend the driver. Within the United States, the driver cannot be held personally liable if the accident occurred within the scope of employment.

In Case of Accident

- Call the rental company and report. If rented on a government travel card, call travel card company and report immediately.
- If the police respond, try to get a copy of the accident report or find out how to get a copy later
- If someone else is injured in the accident and renter is TDY at or near a base, renter should inform the base legal office of the accident. If renter is not near a base, he or she should contact their base legal office upon return.
- Inform the staff judge advocate (SJA) immediately if renter becomes aware that litigation is filed regarding a vehicle rented by an Air Force or Space Force member/employee, even if the United States is not a named party in the suit
- Never admit liability or make payment assurances at the site of an accident

REFERENCES

Tort Claims Procedure, 28 U.S.C. § 2679

Federal Acquisition Regulation (FAR) §§ 28.312, 52.228-8

Joint Federal Travel Regulations (JTR), <http://www.defensetravel.dod.mil/Docs/perdiem/JTR.pdf>

Defense Transportation Regulation (DTR) DoD Regulation 4500.9-R-Part I, *Passenger Movement* (May 2016), including changes through 14 January 2021

AFI 51-306, *Administrative Claims for and Against the Air Force* (14 January 2019), incorporating Change 2, 17 July 2020

Defense Travel Management Office, <http://www.defensetravel.dod.mil/index.cfm>

FINANCIAL LIABILITY INVESTIGATIONS: REPORTS OF SURVEY (ROS)

Commanders at all levels are responsible for not only the personnel in their unit, but also for all assigned equipment and property under their control. Occasionally some of that equipment may be lost, damaged or destroyed. Depending on the type of item(s) that are lost or damaged, a financial liability investigation (formerly known as a report of survey (ROS)) might be required to investigate and document the circumstances and determine the appropriate corrective actions. It is important to note that the information discussed below does not apply to nonappropriated fund (NAF) assets. Nonappropriated fund assets are governed by the procedures outlined in Chapter 8 of Air Force Manual (AFMAN) 34-202, *Procedures For Protecting Nonappropriated Fund Assets*.

Purposes

- The primary purpose of the financial liability investigation is to determine financial liability for the loss, theft, damage, or destruction of government property. This purpose is accomplished by:
 - Investigating the cause of loss, damage, or destruction of property and determining if it was attributable to an individual's negligence or abuse
 - Assessing monetary liability or relieving individuals from liability if there is no evidence of negligence, willful misconduct, or deliberate unauthorized use
 - Providing documentation to support adjustment of accountable records
 - Providing commanders with case histories to enable them to take corrective action to prevent recurrence of the incident

Mandatory Financial Liability Investigation

- A financial liability investigation is mandatory when the following have been lost, damaged, destroyed, or stolen:
 - Sensitive, classified, or leased (capital lease) property regardless of initial acquisition cost
 - Real property
 - Government-owned equipment where there is evidence of negligence or abuse and the equipment has an initial cost (value) of \$5,000 or more

Non-Mandatory Financial Liability Investigation

- For all other losses, commanders have discretion to conduct a formal financial liability investigation when the circumstances warrant it (e.g., when the loss, damage, destruction or thefts of small amounts of property occur frequently enough to suggest a pattern of wrongdoing)
- Additionally, commanders may use other investigations or inquiries such as a Commander Directed Investigation to augment a financial liability investigation

Liability Thresholds

- Before moving into the process itself, it is important to be aware of the amount of financial liability Air Force and Space Force members may be expected to repay. These amounts vary depending on the nature of the items affected by the loss/damage. In most cases, the liability threshold is limited to the full amount of the loss, damage, or destruction, or up to one month of the member's basic pay, whichever is less

The Financial Liability Investigation Process

- The first step to initiating a financial liability investigation is for the appointing authority to appoint an investigating officer (IO) to determine the facts. Some of the investigative processes are highlighted below.

- At a minimum, the IO will answer the following six questions:
 - What happened?
 - How did it happen?
 - Where did it happen?
 - When did it happen?
 - Who was involved?
 - Were there any evidence of negligence, willful misconduct, or deliberate unauthorized use or disposition of the property?
- Based on the facts gathered, the IO makes findings and recommendations on the issue of liability of the person(s) involved
- The financial liability investigation is forwarded for legal review
- Upon legal review, the investigation and IOs recommendations are reviewed by the appointing authority who determines liability
- If liability is approved, the appointing authority informs the subject(s) of the determination and gives him or her an opportunity to provide a rebuttal
- The approving authority then reviews and considers the rebuttal and makes a second determination as to liability
- If the member is held liable, the approving authority sends the financial liability investigation to the financial manager to process for collection
- The final paperwork then goes to the equipment custodian to write off the property

Processing Times

- As lost, damaged, or destroyed property has an impact on both the Air Force or Space Force and the individual(s) liable, the Air Force and Space Force have established the following timelines for initiation and completion of a financial liability investigation:
 - Within 10 days from the date of the discovery of the loss, the unit's supervision will conduct the initial inquiry (not a formal investigation) and gather data to determine whether the situation warrants a more formal investigation
 - Within 11 days from the date of the discovery of the loss, the appointing authority will appoint an IO if a formal financial liability investigation is required or desired, and obtain a ROS case number
 - The financial liability investigation should generally be completed within 90 days of the date of the discovery of the loss
 - Additional timelines for each step of the investigative process may be found in the *SAF/FMF Reports of Survey Program Policy Memorandum*, dated 9 November 2018

REFERENCES

DoD 7000.14-R, *Department of Defense Financial Management Regulation* (DoD FMR), Volume 12, Chapter 7, *Financial Liability for Government Property Lost, Damaged, Destroyed, or Stolen* (March 2014)

SAF/FMF Memorandum, *Reports of Survey Program – Policy Memo* (9 November 2018)

AFI 23-101, *Materiel Management Property* (22 October 2020)

AFMAN 23-122, *Materiel Management Procedures* (27 October 2020)

AFMAN 34-202, *Procedures For Protecting Nonappropriated Fund Assets* (25 June 2019)

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CHAPTER THIRTEEN: FISCAL AND CONTRACTING ISSUES

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FOUNDATIONS OF FISCAL LAW

Fiscal law requires the commander to have affirmative authority to use funds for a particular purpose. This is unlike many other area of the law that permit commanders to exercise authority, so long as it is not expressly prohibited, in order to complete the mission. In fiscal law, any expenditure of funds requires Congress to have authorized and appropriated funds. The three pillars of affirmative authority are “purpose, time, and amount.”

Purpose

- Funds may be expended only for the purpose intended by Congress. However, not every expenditure is required to be specified in an appropriations act. The Government Accountability Office (GAO) applies a three-part test to determine whether an expenditure is a “necessary expense” and meets the purpose of a particular appropriation:
 - The expenditure must be necessary and incident to the purposes of the appropriation;
 - The expenditure must not be prohibited by law; and
 - The expenditure must not otherwise fall within the scope of another appropriation or statutory funding scheme
- Examples of common issues regarding questionable expenses (i.e., items that are generally for personal use/convenience):
 - Bottled Water: Generally a personal expense, with some exceptions for disasters and locations where no potable water exists
 - Personal Office Furniture and Equipment: If items only serve a single individual (exception for handicapped employees)
 - Clothing: Generally a personal expense with limited exceptions
 - Payment of Fines and Penalties: Generally a personal expense unless individual directed to incur the fine or penalty or a fine or penalty imposed on the agency itself
 - Food: Generally a personal expense with some exceptions for certain situations involving training, conferences, and award ceremonies

Time

- An agency may obligate funds only within the time limits applicable to the appropriation (e.g., installation operation and maintenance (O&M) funds are typically available for one year, while military construction (MILCON) funds are typically available for five years)
 - Bona Fide Needs Rule: Generally, government agencies may not purchase supplies or services unless there is a bona fide (good faith) need for the supply/service in the fiscal year in which they are to be purchased. In other words, the default rule is that current fiscal year money should only be used for current fiscal year needs. Generally, the time limitations apply to the obligation of funds and not the disbursement or payment of the funds.
 - For Supplies: Common exceptions to the default rule are allowed where a lead-time is required to either produce or deliver the supply, or to maintain normal/customary (i.e., not excessive) stock levels of a supply

- For Services: The bona fide need does not arise until the services are rendered and must be funded with funds current as of the date the services are performed. For severable services, such as lawn maintenance, Department of Defense agencies may obligate funds current at the time of contract award to finance a severable services contract with a period of performance that does not exceed one year (may cross fiscal years). For non-severable services, such as the results of a longitudinal healthcare study, the Department of Defense (DoD) must fund with dollars available for obligation at the time the contract is executed and performance of the contract may cross fiscal years.
- Every appropriation has a period of availability during which money can be obligated from the appropriation. Generally, an appropriation is available for new obligations only during its period of availability. Once the period of availability lapses, the appropriation will expire and eventually close.

Amount

- An agency must obligate funds within the amounts appropriated by Congress. In other words, do not spend more money than Congress has authorized the agency to spend.

The Anti-Deficiency Act (ADA)

- The ADA was originally enacted by Congress to prevent the federal government from making expenditures in excess of the amounts that Congress appropriated. Under the ADA an officer or employee of the U.S. Government may **NOT**:
 - Make or authorize an expenditure or obligation exceeding an amount available in an appropriation unless authorized by law
 - Involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law
 - Make or authorize an expenditure or obligation exceeding an apportionment, or the amount permitted by regulations
 - Accept voluntary services for the United States or employ personal services, except for emergencies involving the safety of human life or the protection of property, or unless authorized by law
- Either a purpose or time violation may also lead to an ADA violation. Officials can avoid an ADA violation if both of the following corrective conditions are met:
 - Proper funds were available at the time of the erroneous obligation; and
 - Proper funds were available at the time of correction for the agency to correct the erroneous obligation
- Potential consequences for ADA violations include adverse personnel actions and/or criminal penalties for a knowing and willful ADA violation, a Class E felony, including not more than a \$5,000 fine, confinement for up to two years, or both

REFERENCES

- Contracts for Periods Crossing Fiscal Years, 10 U.S.C. § 2410a
- Appropriations, 31 U.S.C. § 1301(a)
- Anti-Deficiency Act, 31 U.S.C. §§ 1341 *et seq.*
- Limitations on Expending and Obligating Amounts, 31 U.S.C. § 1341
- Limitations on Voluntary Services, 31 U.S.C. § 1342
- Reports on Violations, 31 U.S.C. § 1351
- Balances Available, 31 U.S.C. § 1502(a)
- Prohibited Obligations and Expenditures, 31 U.S.C. § 1517(a)
- United States v. MacCollom*, 426 U.S. 317 (1976)
- DoD 7000.14-R, *Department of Defense Financial Management Regulation* (December 2020), <https://comptroller.defense.gov/FMR/>
- Principles of Federal Appropriations Law – U.S. Government Accountability Office (GAO), 3rd and 4th eds. (“The Red Book”), <https://www.gao.gov/legal/appropriations-law-decisions/red-book>
- AFI 65-601, Volume 1, *Budget Guidance and Procedures* (24 October 2018)
- AFI 65-601, Volume 2, *Budget Management for Operations* (29 January 2021)
- AFMAN 65-605, Volume 1, *Budget Guidance and Technical Procedures* (16 August 2012), incorporating Change 1, 29 July 2015, including AFMAN65-605, Volume 1_AFGM2020-01, 17 November 2020

FOUNDATIONS OF CONTRACT LAW

The current acquisition environment is complex and faces increased scrutiny and restraints. Nevertheless, the Department of Defense (DoD) is relying more than ever on contractors to deliver necessary supplies and services to the warfighter. Budgetary pressures, intense scrutiny of a commander's use of appropriated funds, and increased requirements have resulted in a more complex legal landscape. Despite this, the Department of the Air Force contracting workforce has decreased in the last decade. Thus, it is imperative that acquisition professionals, attorneys, and commanders work together to protect the integrity, precision, and reliability of the acquisition process.

Contracting Authority

- Commanders have a duty to ensure personnel are informed of proper contracting authority
- Normally, only contracting officers (COs) who have been delegated authority by the head of an agency in the form of a "warrant" have the authority to enter into contracts on behalf of the U.S. Government to purchase the supplies, services, and construction requirements for the operation of the installation or unit
 - Contract authority and limitations are specified in the CO's "warrant"
 - Government purchase card (GPC) cardholders (with limited thresholds) have limited contract authority
- Generally, commanders do not have contracting authority

Unauthorized Commitments

- On occasion, an individual without contract authority will enter into a commitment to accept supplies or services. Once discovered, unauthorized commitments may be "ratified" by a person with contract authority, thereby allowing for government payment. Ratification procedures and authorization levels are provided in the Air Force Federal Acquisition Regulation Supplement (AFFARS).
- An unauthorized commitment must meet the seven criteria set forth at Federal Acquisition Regulation (FAR) 1.602-3(c) to be eligible for ratification:
 - Supplies or services have been provided to and accepted by the government, or the government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;
 - The ratifying official has the authority to enter into a contractual commitment;
 - The resulting contract would otherwise have been proper if made by an appropriate CO;
 - The CO reviewing the unauthorized commitment determines the price to be fair and reasonable;
 - The CO recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;
 - Funds are available and were available at the time the unauthorized commitment was made; and
 - The ratification is in accordance with any other limitations prescribed under agency procedures

- The commander of the organization involved must ensure the CO is provided a report of the circumstances surrounding the unauthorized commitment, including a statement on corrective actions taken to prevent a recurrence of the event and a description of disciplinary action taken, or an explanation of why no action was taken
- Any unauthorized commitments that are not ratified are the sole financial responsibility of the individual making the unauthorized commitment and are not the financial responsibility of the government

REFERENCES

FAR 1.6, *Career Development, Contracting Authority, and Responsibilities*

FAR 1.602-3, *Ratification of Unauthorized Commitments*

DFARS 201.603, *Selection, Appointment, and Termination of Appointment for Contracting Officers*

AFFARS Subpart 5301.6, *Career Development, Contracting Authority, and Responsibilities* AFFARS 5301.602-3, *Ratification of Unauthorized Commitments*

AF PGI 5301.602-3-90, *Procedure for Processing Ratifications of Unauthorized Commitments*

AFMAN 64-302, *Nonappropriated Fund (NAF) Contracting Procedures* (26 September 2019)

ACQUISITION STRATEGY AND PLANNING

Acquisition planning is required to ensure that the Department of the Air Force obtains requirements in the most effective, economical, and timely manner possible. Commanders must ensure sufficient capability to manage and oversee the contracting process from start to finish. The key elements of acquisition strategy and planning include market research, communication with industry, identifying government needs, developing specific requirements or objectives, competition requirements, and selecting the most suitable form of contract and source selection procedure. Some functions, such as inherently governmental functions (IGFs), cannot be performed by contractors. Other functions require special consideration before deciding to contract and how the contract ought to be administered.

Inherently Governmental Functions (IGFs)

- IGFs must not be performed by anyone other than a government employee. Contractors are specifically prohibited from performing these functions. If, after awarding a contract, monitoring reveals that contractors are performing IGFs, Air Force and Space Force personnel must reestablish control over these functions by strengthening oversight, in-sourcing the work to government employees, refraining from exercising options under the contract, or terminating all or part of the contract.
- FAR 7.503(c) provides a list of examples of functions considered to be IGF. Among these are:
 - The direct conduct of criminal investigations
 - The control of prosecutions and performance of adjudicatory functions
 - The command of military forces
 - Combat
 - The determination of budget policy, guidance, and strategy
 - The direction and control of federal employees

Contracts and Inherently Governmental Functions (IGFs)

- With respect to prime contracts, FAR 7.503(c)(12) details specific federal acquisition roles and responsibilities that may not be performed by contractors
- FAR 7.503(d) identifies functions that are **NOT** generally considered IGFs and also explains how the nature of the function, the manner in which the work is performed, and how the government administers the performance are all important considerations in determining whether the performance of a particular function may approach being an IGF
- Contract provisions may reinforce the limitations on contractor authority
- Determinations of IGFs are made by the manpower analysts following DoDI 1100.22, *Policy and Procedures for Determining Workforce Mix*

REFERENCES

- Contracts: Planning, Solicitation, Evaluation, and Award Procedures, 10 U.S.C. § 2305
- Contractor Performance of Acquisition Functions Closely Associated with Inherently Governmental Functions, 10 U.S.C. § 2383
- Public-Private Competition Required Before Conversion to Contractor Performance, 10 U.S.C. § 2461
- Guidelines and Procedures for Use of Civilian Employees to Perform DoD Functions, 10 U.S.C. § 2463
- Planning and Solicitation Requirements, 41 U.S.C. § 253a
- FAR Part 2, *Definitions of Words and Terms*
- FAR Part 7, *Acquisition Planning*
- FAR 7.503, *Policy*
- DFARS 207.5, *Inherently Governmental Functions*
- Office of Procurement Policy (OFPP) Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions* (12 September 2011)
- Office of Management and Budget (OMB) Circular A-76, *Performance of Commercial Activities* (29 May 2003), updated 2 June 2020
- DoDI 1100.22, *Policies and Procedures for Determining Workforce Mix* (12 April 2010), incorporating Change 1, 1 December 2017
- AFI 63-138, *Acquisition of Services* (30 September 2019)

COMPETITION IN CONTRACTING

Federal law, such as the Competition in Contracting Act (CICA), requires the government to achieve competition when selecting contractors to perform services or provide supplies. Commanders should ensure that any contracts not awarded through “full and open competition” fall under a statutory exception and include the required written justifications.

The Competition in Contracting Act

- The Competition in Contracting Act (CICA), 10 U.S.C. § 2304, requires “full and open competition through the use of competitive procedures” unless an express exception applies. To fulfill competition requirements, the procuring office will advertise the requirement, request bids or proposals, and select an awardee based on the solicitation’s evaluation criteria.
- CICA has two categories of exceptions, allowing limited competition and sole-source awards
 - Limited Competition: “Full and open competition after exclusion of sources” allows the procuring office to limit the sources from which it seeks competition. Examples of these limitations include the requirements of the Small Business Act, assistance needed after a major disaster or during an emergency wherein solicitations can be limited to local firms, or to establish or maintain alternate sources of supplies or services.
 - Sole Source Awards: Made through “other than full and open competition” and will require a written justification and approval (J&A) identifying the specific exception. Non-exhaustive examples of acceptable justifications might include factors such as unusual or compelling urgency (i.e., delay in award would result in serious injury, financial or other, to the government), or only one contractor can provide the service or supply.
- Air Force and Space Force installations have designated competition and commercial advocates whose duties include promoting full and open competition and commercial practices in acquisition programs
- Contract Modifications: A modification to an existing contract will violate CICA when the changes are beyond the scope of the original contract and a sole source award has not been justified. This analysis of scope considers the degree of change in the type of work, performance period, contract cost, and whether the change is the type that offerors could have anticipated when bidding on the originally awarded contract.
- Unsolicited Proposals: Commanders may potentially receive an unsolicited proposal from a business, apart from (not in response to) any solicitation from the government. An unsolicited proposal is a written proposal introducing a new or innovative idea and seeking a contract with the government without competition. Because receipt of unsolicited proposals often creates a risk of unintended exposure of proprietary information, the Department of the Air Force has established regulations prescribing procedures and standards for safeguarding and evaluating unsolicited proposals. CICA requirements are not waived for unsolicited proposals. If award of a contract is contemplated, a sole source award justification and approval must be accomplished.

REFERENCES

The Competition in Contracting Act, 10 U.S.C. § 2304

FAR Part 2, *Definitions of Words and Terms*

FAR Part 6, *Competition Requirements*

FAR Subpart 15.6, *Unsolicited Proposals*

DFARS Part 206, *Competition Requirements*

AFFARS Part 5306, *Competition Requirements*

AFFARS MP5306.502, *Air Force Competition and Commercial Advocacy Program*

AFFARS MP5315.606-90, *Receipt, Evaluation, and Disposition of Unsolicited Proposals*

ACQUISITION PROCESS

“Acquisition process” describes how the Department of the Air Force purchases supplies and services. The acquisition process is subject to the rules contained in various Federal, Department of Defense, and Department of the Air Force regulations. The process is heavily regulated even for small purchases. If issues arise when purchasing supplies or services, the best course of action is to work with your contracting squadron and legal office.

Micro-Purchases

- A micro-purchase is a government purchase of supplies or services which in the aggregate, for the Department of Defense (DoD), does not exceed a specific threshold (may vary by fiscal year (FY) and subject to change, based on Congressional legislation), currently set at \$10,000, except for:
 - Acquisition of supplies or services for basic research programs and for activities of the DoD science and technology reinvention laboratories, when the value is \$10,000
 - Construction, when the value is \$2,000
 - Services, when the value is \$2,500
 - Support of contingency or chemical/biological/radiological/nuclear (CBRN) recovery/defense operations (excluding construction), the threshold is \$20,000 inside the United States and \$35,000 outside the United States
- The DoD is directed to use the government purchase card (GPC) to pay for purchases valued at or below the micro-purchase threshold. Purchases on the GPC are limited to the micro-purchase threshold unless orders are placed against pre-priced vehicles (such as the federal supply schedule, a blanket purchase agreement, or an indefinite delivery, indefinite quantity (IDIQ) contract), in which case the limit is \$25,000 for authorized cardholders. Note: splitting a larger purchase into smaller segments to stay under the micro-purchase threshold is **NOT** allowed.
- Timeline: Full and open competition is not required. A determination must be made by the authorized individual that the price is reasonable. As much as possible, micro-purchases should be distributed equitably among qualified suppliers.

Simplified Acquisition Procedures

- Simplified acquisition procedures allow the contracting officer (CO) to reduce the amount of time required to procure supplies and services below the simplified acquisition threshold, and to create or utilize more efficient ordering methods. These procedures are used to purchase more routine items like office supplies and grounds-keeping services. The current simplified acquisition threshold is \$250,000.
 - For support of contingency or CBRN recovery/defense operations (excluding construction), the threshold is \$800,000 inside the United States and \$1.5 million outside the United States
 - Acquisitions under the simplified acquisition threshold are reserved exclusively for small businesses
- Commercial Items: It is the government’s policy to procure commercial items when possible. COs can use simplified acquisition procedures when purchasing commercial items not exceeding \$7 million (\$13 million if purchasing commercial items in support of contingency or CBRN recovery/defense operations).
- Timeline: COs can use streamlined acquisition procedures designed to reduce the time required to solicit and award contracts. Generally, agencies must publish notice of the proposed action at least 15 days before issuing a solicitation, and then issue a solicitation, which must remain posted for at least 10 days or until after quotations have been opened, whichever is later.

Negotiated Procurement

- An agency can obtain the best value in negotiated acquisitions by using any one or a combination of source selection approaches
- In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection.
 - The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection
- Most Federal acquisitions over \$250,000 use negotiated procurement. Often this is accomplished by using either the lowest-priced technically acceptable approach, where requirements are well defined and risks are low, or a best-value tradeoff where the Department of the Air Force may select a higher priced offer because the offeror has superior past performance or technical skill. There is no dollar threshold limiting the use of negotiated procurement techniques.
- Timeline:
 - Generally, for proposed contract actions expected to exceed the simplified acquisitions threshold (\$250,000), CO's must publicly synopsise a solicitation for 15 days, and then issue a solicitation allowing at least 30 days to respond
 - Timelines for solicitations and the government evaluation of proposals can vary greatly depending upon the monetary value, item, and complexity of the acquisition

REFERENCES

Micro-Purchase Threshold, 10 U.S.C. § 2338

Simplified Acquisition Threshold, 41 U.S.C. § 134

FAR Subpart 2.1, *Definition of Micro-Purchase Threshold*

FAR Part 12, *Acquisition of Commercial Items*

FAR Part 13, *Simplified Acquisition Procedures*

FAR Subpart 13.2, *Actions at or Below the Micro-Purchase Threshold*

FAR Part 15, *Contracting by Negotiation*

FAR 15.101, *Best Value Continuum*

DFARS Part 213, *Simplified Acquisition Procedures*

DFARS Part 215, *Contracting by Negotiation*

DoDI 5000.02, *Operation of the Adaptive Acquisition Framework* (23 January 2020)

AFI 64-117, *Government Purchase Card Program* (22 June 2018), including
AFI64-117_AFGM2020-01, 4 November 2020

CONTRACT ADMINISTRATION

Contract administration concerns everything after forming the contract. This section reviews common issues in contract administration, including inspection and rejection of supplies or services that fail to conform to the contract, warranties, modifying a contract, terminating a contract, and resolving disputes between the Air Force or Space Force and the contractor.

Inspection, Rejection, and Warranties

- Standard contract clauses normally give the government the right to inspect supplies and services before acceptance, reject supplies and services that fail to conform to the contract, and demand the contractor provide supplies and services that comply with the contract. After acceptance, the government normally loses those rights. However, the government does not lose these rights if the defect was latent (meaning a reasonable inspection would not have discovered the defect, fraud upon the government, or gross contractor mistake). Some supply contracts contain warranties, which allow the government, after acceptance, to demand the contractor repair or replace defective supplies or demand the contractor remit a portion of the paid price.

Contract Changes (Modifications)

- Contract changes or modifications are any additions, subtractions, or modifications to the work or performance time required by a contract. Only a contracting officer (CO) may effect a contract modification. Contract modifications are of two types:
 - **Unilateral:** The CO directs a change to the contract. The contractor must comply with the change, but may be entitled to additional compensation or time.
 - **Bilateral:** Both the CO and the contractor agree to modify the contract
- Contract modifications should be in writing. When the contractor believes the government's intentional or unintentional action has, in effect, modified the contract without a written modification, the FAR outlines a procedure for the contractor to notify the CO and resolve the matter. These type of modifications are called "constructive changes." Contract modifications may not change a contract so drastically that it fundamentally changes the original agreement. Such modifications, called out-of-scope changes, may create grounds for competitors to protest at the Court of Federal Claims (COFC) or the Government Accountability Office (GAO) and may allow the contractor to file a claim for money damages or to refuse to perform the out-of-scope work.

Terminating a Contract for the Convenience of the Government

- A termination for convenience (T4C) occurs when the government terminates, fully or partially, a contract because termination is in the government's best interest. The government and the contractor may mutually agree to terminate a contract and incorporate the terms of that mutual agreement into the termination, including a term for the contractor to release all claims against the government. If the government and the contractor cannot agree, or no negotiations occur, the contract and FAR outline a process for the contractor to submit a settlement claim to the contracting officer. This process, and its resolution, vary depending on the type of contract involved and other circumstances. If the contractor dislikes the CO's final decision on settlement, the contractor may appeal that decision to the Armed Services Board of Contract Appeals (ASBCA) or the Court of Federal Claims (COFC). The government has no duty to terminate a contract for the contractor's benefit. The government may not award a replacement contract for an original contract awarded in bad faith and later terminated for convenience.

Terminating a Contract because of a Contractor's Failure to Perform

- A termination for default (T4D), or termination for cause for commercial contracts, occurs when the government terminates a contract because the contractor has failed, without excuse, to perform the contract. If the CO believes the contractor's action or inaction is endangering performance of the contract, the CO usually must provide the contractor written notice of the issue and give the contractor a reasonable amount of time (at least 10 days) to "cure" the issue. This is called a **cure notice**.
- If the contractor fails to positively respond to the cure notice, or fails to perform in situations in which a cure notice is not necessary, the CO usually must provide the contractor written notice of the failure and request the contractor "show cause" why the CO should not terminate the contract. This is called a **show cause** notice.
- If the contractor fails to positively respond to the **show cause** notice, or if no show cause notice is necessary, the CO may issue a final decision terminating the contract for default or cause. The CO and contractor will then negotiate a final settlement of the termination, including any damages the contractor owes the government. If the parties cannot agree, the CO will issue a final decision and the contractor may appeal to the ASBCA or COFC.

Resolving Government and Contractor Disputes

- Disputes between the Department of the Air Force and a contractor are resolved through a process established in the Contract Disputes Act (CDA) and implemented in the FAR mandatory contract clauses.
 - If a contractor believes they are entitled to additional money, time, or other relief, the contractor may demand, in writing, to the government CO, that relief. That demand is called a **claim**.
 - If the government believes that it is entitled to additional money, time, or other relief, the government CO will issue a final decision asserting a right to that relief
 - Only the prime contractor may submit a claim. Claims of subcontractors ("pass through claims") must be filed by the prime contractor.
 - After a claim is submitted, the CO has 60 days to issue a written final decision, or if the claim exceeds \$100,000, identify a firm date by which a final decision will be issued. If no final decision or firm date notice is issued, the contractor may treat the claim as denied, called a deemed denial, and appeal the denial.
- All CO's final decisions, including decisions regarding claims, must be sent to the AF/JA – Civil Law Contract Law Field Support Center (AF/JACQK) for review

REFERENCES

Federal Procurement Policy – Division C, 41 U.S.C. §§ 3101-4714

Contract Disputes, 41 U.S.C. §§ 7101-7109

FAR Part 43, *Contract Modifications*

FAR Part 49, *Terminations of Contracts*

AFFARS Subpart 5333.2, *Disputes and Appeals*

AFFARS Part 5349, *Termination of Contracts*

Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982)

Rules of the United States Court of Federal Claims (3 August 2020), <https://www.uscfc.uscourts.gov/rcfc>

Rules of the Armed Services Board of Contract Appeals (21 July 2014), <https://www.asbca.mil/Rules/rules.html>

COMMUNICATIONS WITH INDUSTRY/INTERFACING WITH CONTRACTORS

- Air Force and Space Force leaders are expected to proactively and effectively engage with industry groups and commercial entities to help ensure we maintain our ability to rapidly innovate and stay ahead of our adversaries. However, such engagement efforts by Air Force and Space Force personnel must comply with federal laws and regulations on procurement and ethical conduct.
- Meetings are generally permitted subject to the following guidelines:
 - Ensure the purpose of the meeting is clear to the Air Force, Space Force, and industry participants. The nature and types of information shared or obtained during these meetings must not provide the commercial entity with an unfair competitive advantage.
 - Include other interested or potentially interested parties and commercial entities in such meetings if possible and practical to avoid the appearance you are providing exclusive access to a particular company or group. If you meet exclusively with one entity and another entity requests the same opportunity then you should honor the request in order to avoid any perception of unfair or preferential treatment.
 - Avoid meeting alone with industry. Meetings should include more than one Air Force or Space Force representative, including appropriate subject matter experts who can help keep discussions focused on appropriate subjects, and a designated note taker to ensure discussions are accurately recorded and properly characterized.
 - Focus discussions on topics the Department of the Air Force can discuss, share publicly, and, on publicly-available information the Department of the Air Force would share with any interested party. Avoid discussing proprietary or procurement-sensitive information. If it arises, you are legally obligated to protect it from disclosure to third parties. Do not discuss ongoing procurements or litigation.
 - Do not invite other contractor personnel into the meeting. If support contractor personnel are absolutely necessary as subject matter experts, the senior Air Force or Space Force participant should clearly identify the contractor personnel. A commercial entity may require support contractor personnel to sign a nondisclosure agreement as a condition of participation. In accordance with the Trade Secrets Act, 18 U.S.C. § 1905, government employees should not sign nondisclosure agreements due to their affirmative duty under federal law to protect business trade secrets and proprietary information.
 - As emphasized in the Office of Federal Procurement Policy's (OFPP) industry engagement myth-busting series, "To maximize market research efforts, agencies are encouraged to engage vendors early in the planning process to learn about market capabilities and ways that industry may fulfill requirements in non-traditional ways In partnering with industry representatives, government staff, including industry liaisons, should balance FAR 9.5 requirements to limit conflicts of interest and to ensure that agencies do not inadvertently reduce the field of competition by precluding a potential offeror from participating in a future procurement."

- Senior Air Force and Space Force leaders are often in high demand as speakers, including invitations from non-federal entities to speak at their conferences, roundtables, and other events. To optimize Air Force and Space Force messaging, as well as to coordinate efforts and avoid the potential for preferential treatment, work with the Secretary of the Air Force's Office of Public Affairs (SAF/PA) to ensure your comments align with the Department of the Air Force's strategic themes and messages. Note: you may not solicit invitations from non-federal entities to have a formal speaking role or otherwise participate in an event in a manner that would not be available to a member of the public (e.g., sitting at a head table or having exclusive access to event sponsors).
- Due to concerns regarding preferential treatment, disclosure of non-public information, and appearance of special access, Air Force and Space Force leaders should generally decline invitations to speak to a non-federal entity's internal audience. Additionally, Department of Defense (DoD) and Department of the Air Force conference policies contain specific rules and restrictions regarding participation as a speaker at a non-federal entity hosted conference where a large percentage of the speakers are Department of the Air Force or DoD employees and/or where there is a high cost to attend the conference.

REFERENCES

Trade Secrets Act, 18 U.S.C. § 1905

FAR 9.5, *Organizational and Consultant Conflicts of Interest*

FAR 15.201, *Exchanges with Industry Before Receipt of Proposals*

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7 (17 November 2011)

Secretary of Defense Memorandum, *Engaging with Industry* (2 March 2018)

Office of Federal Procurement Policy Memorandum, "Myth-Busting #4" – *Strengthening Engagement with Industry Partners through Innovative Business Practices* (30 April 2019)

CONFLICTS OF INTEREST (PERSONAL AND ORGANIZATIONAL)

The Federal Acquisition Regulation (FAR) requires government business to be conducted in a manner above reproach and, except as authorized/required by statute or regulation, with complete impartiality. The general rule is to strictly avoid even the appearance of a conflict of interest in government-contractor relationships.

Personal Conflicts of Interest (PCIs)

- Air Force and Space Force employees (military and civilian) are prohibited from participating personally and substantially (e.g., making a decision, giving advice, or making a recommendation) in any government matter that would have a direct and predictable effect on the financial interests of any of the following:
 - The employee, employee's immediate family, or general partner
 - An organization for which the employee serves as an officer, director, trustee, general partner, or employee
 - A company or organization with which the employee is negotiating for employment or has an arrangement for future employment
- Air Force and Space Force employees also should not participate in a particular government matter if the employee believes a reasonable person with knowledge of the facts would question his/her impartiality unless the employee's supervisor and ethics counselor determine that the government's interest outweighs the appearance of a conflict. Such a determination is required where an employee's participation would affect the financial interests of any of the following:
 - A person or organization with which the employee has a business, contractual, or other financial relationship, or is an active participant (e.g., committee chair or project officer)
 - A member of the employee's household or a relative with whom the employee has a close personal relationship
 - An organization for which the employee's spouse, parent, or dependent child works (as an officer, employee, consultant, etc.)
 - An organization the employee has worked for in the past year

Organizational Conflicts of Interest (OCIs)

- OCIs are situations where, because of other activities or relationships, a contractor or potential contractor is unable or potentially unable to render impartial assistance to the government, in a situation of impaired or potentially impaired objectivity, or has an unfair competitive advantage
- The three types of OCIs are:
 - *Unequal Access to Information* (i.e., a contractor's access to nonpublic information may give it an unfair advantage in future competitions)
 - *Biased Ground Rules* (i.e., a contractor's involvement in defining requirements, preparing work statements, or developing business cases could skew a competition in its own favor)
 - *Impaired Objectivity* (i.e., a contractor's judgment or objectivity in performing a contract may be impaired because its performance may affect its other activities or interests)
- FAR 9.508 provides numerous examples of OCIs that have arisen within federal procurements
- Since OCIs call into question the integrity of the procurement process, no specific prejudice must be proven to justify a sustained protest when it is challenged by a competing offeror

REFERENCES

Acts Affecting a Personal Financial Interest, 18 U.S.C. § 208

Personal and Business Relationships, 5 C.F.R. § 2635.502

FAR 3.104, *Procurement Integrity*

FAR 9.5, *Organizational and Consultant Conflicts of Interest*

FAR 9.508, *Examples of Organizational and Consultant Conflicts of Interest*

CONTRACTORS AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES

Contractors often support military forces overseas, including in contingency environments. Commanders must understand the basic rules and policies regarding contractor personnel overseas. There are two types of contractors who support these overseas contingency operations: those with “Contractors Authorized to Accompany the Force (CAAF)” status and those without this status (non-CAAF).

Contractors Authorized to Accompany the Force (CAAF)

- CAAF are contractor personnel, including all tiers of subcontractor personnel, who are authorized to accompany the force in applicable contingency operations and have been afforded CAAF status through a letter of authorization (LOA)
- CAAF generally include U.S. citizen and third-country national contractor employees not normally residing within the operational area whose area of performance is in the direct vicinity of U.S. forces and who routinely are co-located with U.S. forces, especially in non-permissive environments. CAAF status does not apply to contractor personnel in support of contingencies within the boundaries and territories of the United States.
- Contractors are generally responsible for providing their own logistical support. However, in austere, uncertain, and/or hostile environments, the Department of Defense may provide logistical support to CAAF to ensure continuation of essential contractor services.
 - CAAF may receive government-furnished support commensurate with the operational situation in accordance with the terms and conditions of their contract
 - Non-CAAF are not provided the same government-furnished support as they differ from CAAF, typically being permanent residents in the operational area or third country nationals (TCNs) not routinely residing with U.S. forces
 - Non-CAAF support is typically limited to force protection, emergency medical care, and basic human needs (e.g., bottled water, latrine facilities, security, and food when necessary) when performing their jobs in the direct vicinity of U.S. forces

International Law and Contractor Legal Status

- CAAF may support military operations if the force they accompany designates the contractors as CAAF, and also provides CAAF with an appropriate identification card pursuant to the Geneva Conventions
- CAAF may provide communications support, transport munitions and other supplies, perform maintenance functions for military equipment, and provide logistic services such as billeting and messing. Like all contractors, CAAF may not perform inherently governmental functions such as combat.
- If captured during armed conflict, CAAF are entitled to prisoner of war status
- Subject to the application of international agreements, CAAF must comply with applicable host nation and third country nation laws
- CAAF remain subject to U.S. laws and regulations and may be subject to prosecution under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) and the Uniform Code of Military Justice (UCMJ)
- To be a CAAF, the contractor must have an LOA from the contracting officer (CO) specifying this status. Employees deemed as CAAF usually process through a deployment center.

Medical Issues

- CAAF must provide medically and physically qualified personnel
- The Secretary of Defense may direct immunizations as mandatory for CAAF performing DoD essential contractor services
- Generally, CAAF must provide their employees medical care at CAAF's expense
- The government may provide resuscitative care, stabilization, hospitalization and emergency care to prevent the loss of life, limb, or eyesight at a military treatment facility
- Refer to the underlying contract to determine what, if any additional care the government agreed to provide CAAF employees

Individual Protective Equipment

- Generally, contractors shall be required to provide all life, mission, and administrative support to its employees necessary to perform the contract
- When necessary and directed by the geographic Combatant Commander (CCDR), the CO will include language in the contract authorizing CAAF and selected non-CAAF, as designated by the CCDR, to be issued military individual protective equipment (IPE) (e.g., chemical/biological/radiological/nuclear protective ensemble, body armor, ballistic helmet).
 - This equipment shall typically be issued at the deployment center (where CAAF will receive training on the IPE), before deployment to the designated operational area, and must be accounted for and returned to the government or otherwise accounted for in accordance with appropriate DoD Component standing regulation

Uniforms

- CAAF are responsible for providing their own personal clothing, including casual and work clothing required by the particular assignment
- Generally, commanders shall not issue military clothing to CAAF or allow the wearing of military or military look-alike uniforms. However, CCDRs (or a subordinate Joint Force Commander (JFC) deployed forward) may authorize certain CAAF personnel to wear standard uniform items for operational reasons. This authorization shall be in writing and maintained by authorized CAAF personnel at all times. Care must be taken to ensure, consistent with force protection measures, that the CAAF personnel are distinguishable from military personnel through the use of distinctive patches, arm bands, nametags, or headgear.

Force Protection and Weapons Issuance

- CCDRs must develop a security plan for protection of those CAAF personnel (and non-CAAF personnel) in locations where there is not sufficient or legitimate civil authority and the commander decides that it is in the interests of the government to provide security because of any of the following:
 - The contractor cannot obtain effective security services;
 - Such services are unavailable at a reasonable cost; or
 - Threat conditions necessitate security through military means
- CAAF personnel may be armed for individual self-defense, on a case-by-case basis, **ONLY IF**:
 - It is determined that military force protection and legitimate civil authority are deemed unavailable or insufficient;

- It is authorized by the geographic combatant commander; and
- It does not violate applicable U.S., host nation, and international law, relevant status of forces agreements (SOFAs) or international agreements, or other arrangements with local host nation authorities
- Commanders should consult with their staff judge advocate prior to authorizing the arming of CAAF. If weapons are authorized:
 - The government shall ensure completion of weapons familiarization, qualifications, and briefings on the rules regarding the use of force;
 - Acceptance of weapons by CAAF personnel shall be voluntary and permitted by the defense contractor and the contract; and
 - These CAAF personnel must not be otherwise prohibited from possessing weapons under U.S. law

Security Services

- If consistent with applicable U.S., host nation, and international law, and SOFAs or other international agreements, a defense contractor may be authorized to provide security services provided they are not performing an inherently governmental function, and are limited to providing a defensive response to hostile acts, or to demonstrated hostile intent
- Whether a particular use of contract security personnel to protect military assets is permissible is dependent on the facts and requires legal analysis
 - Requests shall be reviewed on a case-by-case basis by the appropriate staff judge advocate to the CCDR (or designee)
 - Contractors shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. In these situations, contract security services will not be authorized to guard U.S. or coalition military supply routes, military facilities, military personnel, or military property except as specifically authorized by the geographic combatant commander.

REFERENCES

Persons Subject to the UCMJ, 10 U.S.C. § 802

War Crimes, 18 U.S.C. § 2441

Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261

DFARS Subpart 225.3, *Contracts Performed Outside the United States*

DoDI 3020.41, *Operational Contract Support (OCS)* (20 December 2011), incorporating Change 2, 31 August 2018

DoDI 3020.50, *Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises* (22 July 2009), incorporating Change 2, 31 August 2018

AFI 64-105, *Contingency Contracting Support* (1 October 2020)

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STANDARDS OF ETHICAL CONDUCT

Every employee must be aware of and comply with the Standards of Ethical Conduct for Executive Branch Employees (5 CFR Part 2635) and the Joint Ethics Regulation (JER), DoD 5500.07-R. Department of Defense (DoD) employees shall not engage in any personal business or professional activity that places them in a position of conflict between their private interests and the public interest of the United States. In order to preserve the public confidence in the Air Force and Space Force, even the appearance of a conflict of interest must be avoided.

- DoD personnel shall not use inside information to further a private gain for themselves or others if that information was obtained by reason of their DoD position and is not generally available to the public
- Personnel may obtain further clarification of the standards of conduct and conflict of interest provisions by consulting with their servicing legal office or ethics counselor
- Commanders must emphasize that resolution of a conflict of interest must be accomplished as soon as practicable
- The JER prohibits some specific activities, including:
 - Active duty members making personal commercial solicitations or solicited sales to DoD personnel junior in rank at any time (on- or off-duty, in or out of uniform), particularly for insurance, stocks, mutual funds, real estate, or any other commodities, goods, or services
 - Soliciting or accepting any gift, entertainment, or thing of value from any person or company, which is engaged in procurement activities or does business with any agency of the DoD (including contractors). There are numerous exceptions to this rule, so, if offered a gift, consult the ethics counselor — normally the staff judge advocate (SJA).
 - Soliciting contributions for gifts to a superior, except voluntary gifts or contributions of nominal value (not to exceed \$10) on special occasions like marriage, birth/adoption of a child, transfer (PCS/PCA), or retirement
 - Active duty military or civilian personnel using their grades, titles, positions, or organization names in connection with activities performed in their personal capacities
 - Endorsing a non-federal entity, event, product, service, or enterprise (explicit or implied). DoD employees must not use their official capacities and titles, positions, or organization names to suggest official endorsement or preferential treatment of any non-federal entity except those listed in JER §3-210, such as the Combined Federal Campaign and the Department of the Air Force Assistance Fund.
 - Accepting employment outside of the DoD, if it interferes with or is not compatible with the performance of government duties, or if it might discredit the government
 - Unauthorized gambling, while on-base or on-duty
- DoD employees may not participate in their official DoD capacities in the management of non-federal entities unless pursuant to a federal statute and with authorization from the DoD General Counsel
- DoD employees may, however, serve as DoD liaisons to non-federal entities when appointed by the head of the DoD component command or organization who determines there is a significant and continuing DoD interest to be served by such representation. Liaisons serve as part of their official DoD duties, under DoD component memberships, and represent only DoD interests to the non-federal entity in an advisory capacity.

- The JER imposes annual financial reporting requirements for officers in the grade of O-7 or above and other government officials such as commanding officers and procurement officials

REFERENCE

5 CFR Part 2635 (2020)

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

U.S. Department of Defense Standards of Conduct Office, <https://dodsoco.ogc.osd.mil/>

FINANCIAL DISCLOSURE FORMS

The Department of Defense (DoD) currently uses two different financial disclosure forms — the Office of Government Ethics (OGE) 450 and the OGE 278e. The Code of Federal Regulations (CFR) describes who must file, outlines the required contents in these reports, and specifies filing times. The form an individual must use depends on the rank or grade and responsibilities of that individual. Office of Government Ethics policy requires OGE 278e filers to use the [Integrity.gov](https://www.integrity.gov) electronic filing system, unless electronic filing is not practically possible, such as in certain deployed or remote locations. DoD policy requires OGE 450 filers to use the Financial Disclosure Management (FDM) online reporting system. Both systems utilize the most current OGE forms and build upon prior years' inputs to reduce duplication of efforts. However, OGE 278e filers are also required to file monthly OGE 278T periodic transaction reports within [Integrity.gov](https://www.integrity.gov) system. Contact your servicing staff judge advocate (SJA) to determine whether these online systems are available at your location.

Confidential Financial Disclosure Report (OGE 450)

- Persons required to file this form include:
 - Commanding officers, heads and deputy heads of all installations or activities, if the military member is O-6 and below or if a civilian, is GS-15 or below are required to file an OGE Form 450, also known as an OGE-450. Commanders, heads, and deputy heads who are general officers or senior executive service employees file the OGE 278e report exclusively.
 - All military members (O-6 and below) and all civilian employees (GS/GM-15 and below) when their duties require them to participate personally and substantially in taking an official action for contracting or procurement, or if the supervisor determines such a report is necessary to avoid an actual or apparent conflict of interest
- Specific requirements for this report are set forth in Chapter 7 of the Joint Ethics Regulation (JER), including:
 - The report must provide sufficient information about the individual, as well as spouse and dependent children, such that an informed judgment can be made regarding compliance with conflict of interest laws
 - No disclosure of amounts or values is required
 - This report must be filed within 30 days after assuming a covered position and annually thereafter
- Annual reports are submitted to the servicing SJA no later than 15 February for the preceding calendar year

Public Financial Disclosure Report (OGE 278e)

- Persons required to file this form include:
 - Regular and Reserve officers whose grade is O-7 or above
 - Members of the Senior Executive Service
 - Civilian employees whose positions are classified above GS/GM-15 or whose rate of basic pay is fixed at or above 120 percent of the minimum rate of basic pay for a GS/GM-15
- Specific requirements for the content of this report are set forth in Chapter 7 of the JER
 - Generally, this report is far more detailed in content than the OGE 450

- Although specific amounts are not required on the report, individuals must indicate the value of assets within both a given range and type of asset
- General officers must report a mortgage on their personal residence
- This report must be filed within 30 days after assuming a covered position
- Annual reports must be filed between 1 January and 15 May and cover the preceding calendar year
- An individual must also file a termination report within 30 days after terminating a covered position unless, within 30 days, the individual assumes another covered position
 - Termination reports may be filed up to 15 days prior to the Termination date provided that the individual agrees to update the report with any changes
- Late reports are subject to a \$200 penalty, absent an approved extension

Periodic Transaction Report (OGE 278T)

- Must be filed by OGE 278e filers who conduct the sale, purchase, or exchange of stocks, bonds, and other securities held by the filer, the filer's spouse, or dependent children, with a transaction value exceeding \$1,000
 - This will allow the filer to use the OGE 278T reports when building the annual OGE 278e incumbent report, Schedule B (Transactions)
- Filed on a monthly basis (usually by the 15th of every month); negative reports not required
- Reports are considered late (subject to the \$200 penalty), absent an approved request for an extension, if they are filed more than 30 days after they are due (i.e., 30 days after notification of a covered transaction or 45 days after the actual covered transaction)

REFERENCES

5 CFR §§ 2634.201-2634.205 (2020)

DoD 5500.07-R, *The Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

U.S. Department of Defense Standards of Conduct Office, <https://dodsoco.ogc.osd.mil/>

Financial Disclosure Management System, <https://www.fdm.army.mil>

Integrity.Gov Office of Government Ethics Electronic Filing System, <https://integrity.gov>

OGE 278e, OGE 278T and OGE 450 are available at <http://www.oge.gov/>

GIFTS TO THE DEPARTMENT OF THE AIR FORCE

Accepting or Rejecting Gifts

- The Secretary of the Air Force (SecAF) is the authority to accept conditional gifts of personal property, tangible or intangible, and real property. The General Counsel may accept any gift of personal property. The Assistant Secretary of the Air Force for Installations, Environment and Energy (SAF/IE)) may accept any gift of real property. See AFPD 51-5, *Administrative Law, Gifts, and Command Relationships*, and Chapter 2 of AFI 51-506, *Gifts to the Department of the Air Force from Domestic and Foreign Sources*, for a listing of all Air Force gift acceptance authority. Installation commanders may accept gifts of personal property up to \$5000 (regardless of other delegations).
- Types of Gifts: *Unconditional* gifts have no conditions attached to them. *Conditional* gifts have specific conditions tied to their acceptance (e.g., “a gift of \$15 million to construct a new library wing at the United States Air Force Academy”)
- Gifts may be rejected for any of the following reasons:
 - Acceptance involves expending funds in excess of amounts appropriated by Congress
 - The offered item is extremely dangerous or in poor taste
 - Acceptance of the gift would raise a serious question of impropriety in light of the donor’s present or prospective business relationships with the Air Force or Space Force
 - The cost of acceptance and maintenance is disproportionate to any benefit
 - Acceptance would not be in the best interest of the Air Force or Space Force

Gifts for Distribution

- AFI 51-506, Chapter 7, governs gifts that are received for distribution to individual Airmen and Guardians
- These types of gifts must be used for health, comfort, convenience, or morale. Examples include: playing cards or personal electronic devices for deployed Airmen and Guardians. Products containing tobacco, alcohol, or nicotine are **NOT** acceptable gifts.

Recognition of Donors is Limited

- Receiving commanders may send an appropriate letter of thanks; do not grant special concessions to donors, and do not initiate publicity for donors
- If the gift itself is worthy of a press release (e.g., new USAFA library wing) then the release may discuss the fact of the gift and the identity of the donor without emphasis
- At the discretion of the appropriate commander or gift acceptance authority, donors may be invited, present, and identified at a ribbon-cutting or similar ceremonial public event. However, such events shall not be planned or conducted solely to commemorate acceptance of a gift or acknowledge donors. Appropriated funds may not be used to fund travel, lodging, or donor expenses to be present at such events.

Gifts of Voluntary Service

- 10 U.S.C. § 1588 permits the acceptance of limited gifts of volunteer services, such as: medical services, dental services, nursing services, or other health-care related services; services to be provided for a museum or a natural resources program; and programs administering services to members of the armed forces and their families, including: family support, child development and youth services, library and education, religious, employment assistance to spouses of military members, and morale, welfare, and recreation

- Volunteers must complete a DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities & Nonappropriated Fund Instrumentalities*
- Voluntary legal services may be provided and/or accepted in accordance with 10 U.S.C. §1044 and AFI 51-110, *Professional Responsibility Program*.

REFERENCES

Legal Assistance, 10 U.S.C. § 1044

Authority to Accept Certain Voluntary Services, 10 U.S.C. § 1588

General Gift Funds, 10 U.S.C. § 2601

DoDI 1100.21, *Voluntary Services in the Department of Defense* (27 March 2019)

AFPD 51-5, *Administrative Law, Gifts and Command Relationships* (31 August 2018)

AFI 34-101, *Air Force Morale, Welfare & Recreation (MWR) Programs and Use Eligibility* (16 April 2019)

AFI 36-3009, *Airman and Family Readiness* (30 August 2018), including AFI36-3009_AFGM2020-01, 29 May 2020

AFI 51-110, *Professional Responsibility Program* (11 December 2018)

AFI 51-506, *Gifts to the Department for the Air Force from Foreign and Domestic Sources* (16 April 2019)

DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities & Nonappropriated Fund Instrumentalities* (March 2018)

ACCEPTANCE OF GIFTS

Gifts of Travel

- A non-federal entity (NFE) may gift the cost of an employee's travel for the Air Force or Space Force pursuant to 31 U.S.C. § 1353, in order to allow employees to attend a "meeting" (e.g., meetings, conferences, speaking engagements and events where the employee receives a public service award from the NFE). However, this authority **CANNOT** be used for a "widely attended gathering" or for permissive TDYs.
- Allowable costs include transportation, lodging, meals and conference registration fees
- Approval level for acceptance of travel benefits is at the "highest practical administrative level" (typically the first General Officer/Senior Executive in the chain of command) and such travel benefits should be approved in advance of employee travel
- A travel payment from a NFE shall not be accepted if the approval authority determines that acceptance would cause a reasonable person to question the integrity of Air Force or Space Force programs or operations

Travel Payments

- In-kind provision of travel, lodging and meals is preferred as NFE funds should not pass directly through employee's hands
- In the continental United States (CONUS), the cost of lodging provided may exceed the authorized per diem rate if similar lodging is provided to all other attendees/speakers. Outside of continental United States (OCONUS), the cost of lodging provided may not exceed the Department of State area per diem rate.
- If the NFE offers travel on a commercial airline, the employee may accept travel in coach or in a premium class (e.g., business class) that is not first class. Travel in first class is not permitted unless the conditions exist that would authorize the U.S. Government to purchase a first-class ticket for the employee.
- Travel benefits accepted must be reported to SAF/GCA on the semi-annual SF 326, *Semiannual Report of Payments Accepted from a Non-Federal Source*

Spouse Travel

- A NFE may also pay for travel for employee's spouse if: spouse attendance supports Air Force or Space Force mission; the employee is to receive award or honorary degree from an NFE; or the spouse participates in substantive programs related to Air Force or Space Force programs/operations

REFERENCES

Acceptance of Travel and Related Expenses from Non-Federal Sources, 31 U.S.C. § 1353

41 C.F.R. Part 304 (2019)

AFI 51-506, Gifts to the Department of the Air Force from Domestic and Foreign Sources (16 April 2019)

SF 326, *Semiannual Report of Payments Accepted From A Non-Federal Source*

GIFTS TO SUPERIORS

- In order to avoid the appearance that a supervisor is being improperly influenced, the Joint Ethics Regulation (JER) issues the following guidelines concerning gifts to superiors
- Generally, Air Force and Space Force personnel **MAY NOT**:
 - Directly or indirectly give a gift to a superior
 - Solicit a contribution from other Department of Defense (DoD) personnel for a gift to a superior
 - Make a donation for a gift to a superior
 - Accept a gift from subordinate personnel
- Exceptions to the general rules prohibiting gifts to superiors or their solicitation:
 - On occasions where gifts are traditionally given or exchanged, items having an aggregate market value of \$10 or less, such as food and refreshments, or personal hospitality at a residence, may be given to superiors and accepted from subordinates
 - On occasions of personal significance (marriage, birth of child, etc.) or on occasions that terminate the superior-subordinate relationship (retirement, separation, or permanent change of station (PCS)):
 - Employees may solicit a contribution for a group gift for a unique occasion, provided, however, that contributions must not exceed \$10 per person (the aggregate of individual voluntary contributions are subject to an overall cap of \$300). However, a voluntary contribution of a nominal amount for food, refreshments and entertainment for the superior, the personal guests of the superior and other attendees at an event to mark the occasion for which a group gift is given may be solicited as a separate, voluntary contribution not subject to the \$10 limit.
 - The general rule is that a DoD employee **MAY NOT** accept a gift that exceeds \$300 in value from a group that consists of one or more subordinates to the honoree. Further, if an individual donates to more than one donating group, then the donating groups will be considered to be one donating group and the combined value of the gifts from the groups must be \$300 or less.
 - Donating groups should be defined by reasonable and rational parameters and are usually related to the structure of the overall organization and individual units within that organization. There is no limit on the number of donating groups.
 - A superior employee receiving a gift in excess of \$300 may not “buy down” the gift (i.e., pay back the money in excess of \$300)
 - Under all circumstances, gifts must be truly **voluntary**

REFERENCES

Gifts to Superiors, 5 U.S.C. § 7351

5 C.F.R. §§ 2635.301–2635.304, 3601.104 (2011)

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

GIFTS FROM OUTSIDE SOURCES

When considering the issue of gifts from outside sources/non-federal entities (NFEs), it is important to recall that all Department of Defense (DoD) employees (military and civilian) are beholden to the same Standards of Ethical Conduct as other employees of the Executive Branch. One of the fundamental tenets in this area is that public service is a public trust. In other words, DoD employees must not abuse their official position for private gain — to include using public office to acquire gifts from NFEs which create the appearance of impropriety or are improper/illegal (e.g., bribes/kick-backs).

- General Rule: The Standards of Ethical Conduct prohibit DoD employees from soliciting or accepting a gift from an NFE if it is offered *because* of the employee's official position. Similarly, DoD employees may not solicit or accept a gift from a "prohibited source" (e.g., an NFE engaged in or seeking to engage in business with the defense agency, seeking official agency action, is regulated by the agency, or whose interests may be substantially affected by the employee's duty performance or nonperformance).
- Definition of Gift: A gift is considered anything of value — whether the thing of value be tangible or intangible, such as discounts or memberships. Additionally, gifts to DoD employees' dependents will be considered to be gifts to the DoD employee.
 - Minor items, such as modest items of food and non-alcoholic refreshments, opportunities/benefits available to all military personnel, greeting cards, and other items with negligible intrinsic value and intended primarily for presentation are not considered gifts
 - The acceptance of a meal as part of giving an official speech is not considered a gift.
- Values-Based Decision-Making: Every DoD employee has a responsibility to place loyalty to the Constitution, laws, and ethical principles above private gain. For this reason, and in an abundance of caution, employees should decline otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality as a result of accepting the gift. Factors to consider are the value of the gift, the timing of the gift, the identity of the donor, and any potential access the gift may provide the donor.
- Exceptions to the General Rule Against Accepting Gifts: There are numerous exceptions to the general prohibition above. Common exceptions include: prizes/discounts/incentives open to the public or all DoD employees without regard to official position; the \$20/\$50 rule (DoD employee may accept a non-cash gift valued at up to \$20 per occasion, per source, and no more than \$50 per year from the same source); gifts based on a family/personal or an outside business relationship (including the spouse's employer) and the widely attended gathering (WAG) rule.
- These and the many other gift exceptions require a fact-specific analysis and legal review in order to ensure that a gift may be accepted without creating the reasonable appearance of impropriety or even violating criminal statutes. As such, gift issues should be discussed as early as possible with the servicing staff judge advocate (SJA) or ethics counselor.

REFERENCES

5 C.F.R. § 2635, Subpart B (2016)

5 C.F.R. § 3601.103 (2012)

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

U.S. Department of Defense Standards of Conduct Office, <https://dodsoco.ogc.osd.mil/>

FOREIGN GIFTS

The Constitution prohibits persons holding an “office of profit or trust” for the United States from accepting gifts from foreign “personages or governments” without consent of Congress. Congress has consented to accepting and retaining gifts under certain conditions and when following specified procedures.

- The general prohibition against accepting foreign gifts applies to military members, civilian employees, consultants, and their spouses or other dependents. This includes retired and reserve component members, regardless of duty status, Air National Guard members, when federally recognized, and their spouses and dependents.
- No Department of Defense (DoD) employee may request, or otherwise encourage, the offer of a gift from a foreign government or their agents and representatives
- Small table favors, mementos, remembrances, or other tokens bestowed at official functions, and other gifts of minimal value received as souvenirs or marks of courtesy from a foreign government (e.g., plaques or paper certificates), may be accepted and retained by the recipient
- “Minimal value” is currently defined as not exceeding \$415 in retail value. “Minimal value” is based on the Consumer Price Index and changes every three years. The value of the gift is determined by retail value or fair market value in the United States. If multiple gifts are offered on the same occasion, they will be aggregated when determining value.
- DoD employees shall refuse the offer of a gift greater than minimum value unless refusal would cause offense, embarrassment, or otherwise adversely affect foreign relations. The donor should be advised that U.S. law prohibits persons in service of the United States or their dependents from accepting the gift. However, refusal requires Department of State approval (coordinated through the Office of the Administrative Assistant to the Secretary of the Air Force (SAF/AA)). If the employee accepts a gift greater than minimal value because its refusal is likely to offend or embarrass the donor or adversely affect foreign relations, the gift becomes U.S. property and must be reported to the Air Force and Space Force in accordance with procedures prescribed in AFI 51-506, *Gifts to the Department of the Air Force from Domestic and Foreign Sources*. Further, the employee may purchase a gift (by paying fair market value) if he/she desires by paying full retail value (with the exception of firearms).
- For all foreign gifts, the person receiving the gift should make a written record describing the circumstances of the gift, including the date and place of presentation, identity and position of the donor, description and value of gift, and means by which the value was determined
- For gifts equal to or less than minimal value, the recipient may retain the gift for their personal use including destruction or re-conveyance of the gift as desired
- For gifts of more than minimal value, consult the guidance in AFI 51-506 and make a recommendation as to the disposition of the gift (e.g., display in unit common areas). Gifts of more than minimal value (with the exception of firearms) may also be donated to charitable non-Federal entities, including installation-recognized Private Organizations.

REFERENCES

Receipt and Disposition of Foreign Gifts and Decorations, 5 U.S.C. § 7342

41 C.F.R. § 102-42.10 (2019)

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

DoDD 1005.13, *Gifts and Decorations from Foreign Governments* (19 February 2002), incorporating Change 1, 6 December 2002, certified current 21 November 2003

AFI 51-506, *Gifts to the Department of the Air Force from Domestic and Foreign Sources* (16 April 2019)

HONORARIA

Federal employees may accept the payment of money or anything of value for a speech, teaching, or writing *unrelated* to their official duties, assuming there are no statutory or regulatory prohibitions

- An honorarium is generally defined as a payment given to someone, such as a consultant or a speaker, for which custom or propriety forbids any fixed payment or price be set
- In the context of the Joint Ethics Regulation (JER), honoraria are considered compensation for a lecture, speech, or writing, and involve the payment of money or anything of value
- Federal employees may accept compensation for a lecture, speech or writing based on the employee's field of individualized expertise (rather than official duties or agency operations), even if that field is generally within the agency's area of responsibility
- Use of a military member's grade and military service is acceptable (e.g., as part of an introduction), but requires a disclaimer (either written or verbal) that the views being expressed are those of the speaker/writer and do not necessarily represent the views of the Department of Defense (DoD) or Department of the Air Force
- Although travel reimbursement for a speech related to official duties may be accepted under certain circumstances (see Gifts of Travel), a fee or other direct compensation for speaking for such an engagement **MAY NOT** be accepted
- While 18 U.S.C. § 209 generally prohibits an employee from receiving compensation from an outside source for an activity undertaken as part of the employee's official duties, compensation for speaking, teaching and writing has generally been viewed as falling outside the scope of § 209 because payments are merely gratuitous and are not intended to compensate for government services

REFERENCES

Salary of Government Officials and Employees Payable Only by United States, 18 U.S.C. § 209

5 C.F.R. § 2635.807 (2006)

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

USE OF GOVERNMENT MOTOR VEHICLES

Government Motor Vehicles (GMVs) are closely controlled because of their easy accessibility, high visibility, and potential for misuse. Whether rented, leased, or owned, GMVs should only be used for official purposes. Decisions regarding authorized GMV use/support must be resolved in favor of strict compliance with controlling guidance and with special consideration for avoiding negative public perception. For detailed guidance concerning GMV use for various situations, please consult Chapter 2 of AFMAN 24-306, *Operation of Air Force Government Motor Vehicles*.

Command and Control Vehicles (CACV) and Domicile to Duty (DTD) Transportation

- CACV are for commanders with overall responsibility for operations or installation security needing 24/7 emergency communication support. The approval authority for such vehicles is the MAJCOM/CC (or MAJCOM/CV if delegated).
- CACV authority is not the authority for DTD transportation. CACV should **NOT** be taken to the employee's residence for routine stops.
- DTD transportation, per 31 U.S.C. §1344, is only authorized for:
 - Secretary of the Air Force (SecAF), Chief of Staff of the U.S. Air Force (CSAF), and Chief of Space Operations (CSO)
 - Field work (e.g., recruiters and medical officers performing outpatient service away from military treatment facility (MTF))
 - Intelligence, counterintelligence, protection services, or law enforcement duty
 - Exigent circumstances — namely, highly unusual circumstances that present a clear and present danger, emergency situations, or other compelling operational considerations
- SecAF is the approval authority for DTD transportation. Congress must be notified, in certain circumstances, when DTD transportation is authorized.

National Capital Region (NCR)

- Washington Headquarters Service has an Operating Instruction that governs GMV usage and reflects the ready availability of public transportation in the NCR GMV usage to Commercial and Military Air Transportation Terminals
 - **Only permissible if** terminal is in an area where other modes of travel will not meet mission requirements (e.g., taxi, rideshare not available or parking insufficient)

Permanent Party GMV Usage

- Travel to command picnics, holiday parties, etc. is not authorized
- Travel to Retirement, Change of Command ceremonies is authorized for official participants

Temporary Party GMV Usage

- Transport to/from off base lodging, restaurants & other sustenance is acceptable
- Only reputable non-Adult themed restaurants
- Transport to and from entertainment/recreation locations only when on base

REFERENCES

Passenger Carrier Use, 31 U.S.C. § 1344

Adverse Personnel Actions, 31 U.S.C. § 1349(b)

DoDD 4500.09E, *Transportation and Traffic Management* (27 December 2019)

DoDM 4500.36, *Acquisition, Management, and Use of Non-Tactical Vehicles* (7 July 2015), incorporating Change 1, 20 December 2018

Washington Headquarters Services (WHS) – Serviced Components Administrative Instruction (AI) 109 — Use of Motor Transportation and Scheduled DoD Shuttle Service in the Pentagon Area (31 March 2011), incorporating Change 1, 22 May 2017

AFI 24-301, *Ground Transportation* (22 October 2019)

AFMAN 24-306, *Operation of Air Force Government Motor Vehicles* (30 July 2020)

USING GOVERNMENT FUNDS: MEMENTOS/GIFTS AND OFFICIAL REPRESENTATION FUNDS (ORF)

Federal law requires that appropriated funds not be used to purchase gifts for military members, employees, or private citizens unless specifically authorized by law. The only authority to use Air Force or Space Force appropriated funds for gifts is through Official Representation Funds (ORF), in accordance with AFI 65-603, *Emergency and Extraordinary Expense Authority*. AFI 65-603 specifies the circumstances and the individuals to whom gifts (or “mementos”) may be presented. Generally, nonappropriated funds cannot be used when appropriated funds are authorized, whether such funds are available or not.

Impermissible Use of Funds

- Appropriated Funds: May not be used to purchase permanent change of station (PCS) or retirement mementos for either military or Department of Defense (DoD) civilian personnel
- Nonappropriated Funds: May not be used to purchase PCS mementos for either military or DoD civilian personnel. In general, you cannot use nonappropriated funds to purchase trophies and awards that are used to recognize either mission accomplishment or individual achievements that contribute to military effectiveness.

Permissible Use of Funds

- Nonappropriated Funds: Special Morale & Welfare Funds may be used in support of a *retirement* ceremony to purchase light refreshments (non-alcoholic) within specified limits for a unit celebration for retiring military and DoD civilian personnel. Likewise, nonappropriated funds may be used to purchase trophies and make nominal monetary awards for winners under the individual recognition program, provided appropriated funds are not available or authorized.
- Appropriated Funds: May be used to purchase special trophies and plaques that are used to recognize mission accomplishment, such as personnel of the quarter awards. Additionally, appropriated funds, such as ORF, may *potentially* be used to purchase mementos/gifts for distinguished citizens of foreign countries and prominent U.S. citizens who are not DoD employees under certain circumstances.

Official Representation Funds (ORF)

- ORF is one type of emergency and extraordinary expense fund allowed by 10 U.S.C. § 127. Its purpose is to extend official courtesies of the United States to foreign and domestic dignitaries.
- Use of ORF requires certain ratios of invited attendees to be non-DoD authorized guests. In parties of less than 30 persons, at least 20% of the invitees reasonably expected to attend should be non-DoD. In parties of more than 30 persons, at least 50% of the invitees reasonably expected to attend should be non-DoD authorized guests.
- Only certain individuals will qualify for use of ORF. Examples include members of Congress and Cabinet members, prominent U.S. citizens (retired O-10s are automatically considered prominent U.S. citizens), foreign distinguished citizens, military personnel, and government officials, and the Secretary of the Air Force (SecAF), Undersecretary of the Air Force, Chief of Staff of the Air Force (CSAF), Chief of Space Operations (CSO), Vice Chief of Staff of the Air Force (VCSAF), Vice Chief of Space Operations (VCSO), and certain other Office of the Secretary of Defense (OSD) members.

- AFI 65-603 governs the use of ORF. ORF may be used for meals, receptions and refreshments, reasonable gratuities for services rendered by non-government personnel, recreation events such as sporting activities, sightseeing tours, and concerts for authorized personnel, floral and candle centerpieces for receptions and meals, mementos, modest welcome baskets, and the cost of the gift wrapping, paper or bows, and alcohol at evening events.
- Prohibited uses of ORF: Unless specifically approved by SAF/AA the following uses are **NOT** allowed:
 - Personal items such as toiletry articles, hair and beauty care, souvenirs, and personal clothing items (unless the article of clothing bears the command or unit logo and is given as a memento)
 - Personal phone calls or transportation when official duties are not involved
 - Expenses for support staff (e.g., aides, executive officers, official drivers, and protocol personnel). These individuals are not considered members of the official party.
 - Gifts, flowers, or wreaths for presentation by authorized guests
 - Seasonal greeting and calling cards
 - Cost of music/entertainment for social hours, receptions, and dinners
 - DoD members' (and spouses') cost for recreational activities
 - Membership fees or dues

REFERENCES

Emergency and Extraordinary Expenses, 10 U.S.C. § 127

DoDI 7250.13, *Use of Appropriated Funds for Official Representation Purposes* (30 June 2009), incorporating Change 1, 27 September 2017

AFI 65-601, *Budget Guidance and Procedures*, Vol 1 (24 October 2018)

AFI 65-603, *Emergency and Extraordinary Expense Authority* (29 April 2020)

AFMAN 34-201, *Use of Nonappropriated Funds* (28 September 2018)

AFMAN 65-605, Vol 1, *Budget Guidance and Technical Procedures* (26 November 2019)

OFF-DUTY EMPLOYMENT

Generally, Air Force and Space Force members may participate in off-duty employment, subject to the limitations and prohibitions stated in the Joint Ethics Regulation (JER).

- Personnel should inform their supervisor prior to engaging in outside employment. Air Force and Space Force financial disclosure filers must request approval of outside activities using AF Form 3902, *Application and Approval for Off-Duty Employment*. Although the Air Force and Space Force does not require civilian employees to seek prior supervisory approval to engage in outside employment, there may be a local or command policy to do so. Additionally, all Air Force and Space Force civilian employees **MUST** report outside business activity or compensation to their supervisors per AFI 36-703.
- Financial disclosure filers shall obtain prior supervisory approval **BEFORE** working for a prohibited source using AF Form 3902. Approval to participate in outside employment or business activity will be documented in the Supervisor's Employee Brief. For more information on who is required to file financial disclosures, consult your servicing staff judge advocate (SJA).
- Personnel may not engage in outside employment that:
 - Interferes with or is incompatible with performing their government duties or is prohibited by statute or regulation
 - May reasonably be expected to bring discredit upon the government or the Department of Defense
 - May tend to create a conflict of interest or create an appearance of impropriety
 - Will detract from readiness or pose a security risk
- Personnel are **encouraged** to engage in teaching, writing, or speaking. Such activities must not depend upon information gained as a result of government service, unless available to the public or with approval from the Secretary of the Air Force (SecAF). Generally, federal employees may not receive payment for articles or speeches related to their official duties (See Honoraria).
- Additional requirements for certain professions:
 - Medical providers must consult applicable guidance from AF/SG (to include AFI 44-102, *Medical Care Management*) prior to engaging in off-duty employment
 - Judge advocates desiring to perform off-duty employment should review AFI 51-110, *Professional Responsibility Program*

REFERENCES

5 C.F.R. § 2635, Subpart H (2020)

5 C.F.R. § 3601.107 (2005)

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7 (17 November 2011)

AFI 36-703, *Civilian Conduct and Responsibility* (30 August 2018)

AFI 44-102, *Medical Care Management* (17 March 2015), certified current 22 April 2020

AFI 51-110, *Professional Responsibility Program* (11 December 2018)

AF Form 3902, *Application and Approval for Off-Duty Employment* (March 1995)

KEY SPOUSE PROGRAM

The Department of the Air Force Key Spouse Program is a commander's program to enhance unit family readiness. The role of the Key Spouse is designed to enhance mission readiness and resilience, and establish a sense of community. It is a commander's initiative that promotes partnerships with unit leadership, families, volunteer key spouses, centers, and other installation community agencies. Department of Defense (DoD) components can accept certain volunteer services and the Key Spouse Program falls under such voluntary services (see "Gifts to the Department of the Air Force").

- All key spouses should be appointed by the unit commander
- Once appointed, they should complete key spouse training, sign a DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities & Nonappropriated Fund Instrumentalities*, and complete any necessary information security training, if they will be given access to Air Force and Space Force information technology systems
- Key spouses **MAY NOT** serve in a policy making position; supervise paid employees or military personnel; perform inherently governmental functions; obligate government funds; be accountable for the management, quality, financial solvency, and health/safety of an installation program or activity
- Key spouses are supervised the same way as compensated employees providing like services
- Key spouses receive Federal Tort Claims Act (FTCA) protections for injuries or damage they may cause when they perform official duties as volunteers
- Key spouses receive Federal Employee Compensation Act (FECA) protections for injuries they may incur when they perform official duties as volunteers
- Key spouse members can use government resources and facilities (e.g., office space, computers, e-mail, telephones, supplies, equipment, etc.) and may have access to Privacy Act protected information, as needed to perform their assigned duties. However, they should complete the same training required of any compensated employee or military member who will have access to these resources.
- Training for key spouses shall be provided by the Airman and Family Readiness Center at least on a quarterly basis, or as requested/needed
- If key spouses engage in fundraising (e.g., as a member of a spouses' club), either on or off base, they must adhere to relevant guidance (see "Private Organizations") and ensure they are not acting in their official capacity as the commander's key spouse
- Key Spouses may host annual unit New Spouse Orientation Briefs and Key Spouse Program Volunteer Recognition events and use Special Morale & Welfare funds to purchase modest refreshments (non-alcoholic) for these events, subject to limits

REFERENCES

AFI 36-3009, *Airman and Family Readiness Centers* (30 August 2018) including
AFI36-3009_AFM2020-01, 29 May 2020

AFMAN 34-201, *Use of Nonappropriated Funds* (28 September 2018)

DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities & Nonappropriated Fund Instrumentalities* (March 2018)

UTILIZATION OF ENLISTED AIDE

Authorized Enlisted Aide Duties

- An Enlisted Aide (EA) is assigned to support the assigned general officer (GO) and relieve them of routine duties so that the GO can focus on military duties. They are not assigned to assist the GO's spouse, family, or staff.
- Examples of Permissible EA Duties Include:
 - Cleaning of common areas in GO quarters (GOQ) and general lawn care
 - Care of military uniforms and civilian attire worn for qualifying representational events (QREs)
 - Receiving guests at QREs
 - Planning, preparation and conduct of QREs, receptions, and parties
 - Preparation of daily meals for the GO (and those immediate family members that eat with the GO)
 - Packing of uniforms and professional items and books in permanent change of station (PCS) move
 - Assisting the GO with errands that have a substantive connection to the GO's official responsibilities (e.g., dry cleaning of uniforms)

Unauthorized EA Duties

- Any form of care for family, personal guests, or pets
- Operation or maintenance of any privately owned vehicle (POV) or private recreational equipment
- Personal services or errands for the sole benefit of the GO's family or unofficial guests. The GO may hire an EA, on a truly voluntary basis, outside of normal duty hours, and reimbursing the EA at Department of Labor wage rates, to work (e.g., prepare and serve food) at a private or family event.
- Landscaping in areas not used for QREs
- Skilled maintenance of GOQ or cleaning of private family areas

Sharing of EAs

- GOs can loan EAs to another GO who is authorized use of EAs in order to support a QRE
- A GO's spouse can be designated as an alternate for the purpose of receiving EA support, if the spouse hosts a QRE that has direct connection to the GO's official duties. This includes events when the spouse is hosting events attended by spouses of U.S. dignitaries, foreign dignitaries or foreign military officers when the GO is separately meeting with those individuals.

Permissible and Impermissible EA Assignments

- DoDI 1315.09, *Utilization of Enlisted Aides (EAs) on Personal Staffs of General and Flag Officers (G/FOs)*, Enclosures 3 and 4, contains examples of permissible and impermissible EA assignments in support of QREs, as well as illustrative examples
- Permissible QREs Include:
 - Events to honor local government, congressional personnel, and foreign dignitaries

- Customary unit morale events such as hail and farewell gatherings and holiday parties
- Events to welcome peers and subordinates
- Official events in support of family readiness programs
- Impermissible Non-QREs Include:
 - Purely social events for family, friends and peers (EAs can enter into voluntary off-duty employment arrangements with the GO for such events in return for just compensation)
 - Spouse-hosted social events for unit spouses

REFERENCES

DoDI 1315.09, *Utilization of Enlisted Aides (EAs) on Personal Staffs of General and Flag Officers (GO/FOs)* (6 March 2015), incorporating Change 1, 1 December 2017

AFI 36-2123, *Management of Enlisted Aides* (8 November 2018)

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CHAPTER FIFTEEN: CIVILIAN PERSONNEL AND FEDERAL LABOR LAW

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OVERVIEW OF THE CIVILIAN PERSONNEL SYSTEM

The area of labor and personnel relations is covered by an assortment of statutes, executive orders, and regulations. It is administered by a myriad of administrative bodies located in a variety of federal departments and independent agencies and is a complicated area of the law.

The Workforce Structure

- Six categories offer varying degrees of protection from adverse personnel actions:
 - *Competitive Service*: Consists of all positions not specifically exempted; most employees enter federal service after passing a competitive exam
 - *Excepted Service*: Usually excepted from competition by OPM regulations
 - *Senior Executive Service (SES)*: Reserved for federal civilian employees above GS-15; considered general officer equivalents
 - *Probationary Period Employees*: Employees under a competitive or excepted service appointment in their first two years of service have limited protections
 - *Hybrid Military/Civilian*: Includes National Guard technicians and Air Reserve technicians
 - *Nonappropriated Fund (NAF) Employees*: Consists of morale, welfare and recreation employees

Pay Systems

- Appropriated Fund Employees
 - *General Schedule (GS)*: Divided into 15 grades, GS-1 through GS-15; statutory base pay scale nationwide, plus varying levels of locality pay; automatic pay increases for “acceptable” performance
 - *Executive Schedule*: Statutory basic pay nationwide; potential for merit pay increases
 - *Federal Wage Survey*: Wage Grade (WG)/Wage Leader/Wage Supervisor; pay reflects private sector pay rates in locality for same type of work; manner of computing pay set by statute
- Nonappropriated Fund (NAF) Employees: Pay rates determined by management and may be negotiable with unions

Administrative and Adjudicative Bodies

- Merit Systems Protection Board (MSPB)
 - Hears appeals by certain civilian employees of agency adverse actions — removals, suspensions of more than 14 days, reductions in grade or pay, furloughs of 30 days or less, as well as performance-based removals or reductions in grade, denials of within-grade salary increases, reduction-in-force (RIF) actions, Office of Personnel Management (OPM) suitability determinations and employment practices, denials of restoration of reemployment rights, and certain terminations of probationary period employees
 - Possesses authority to mitigate or completely reverse agency adverse actions taken under 5 U.S.C., Chapter 75, but cannot mitigate performance based actions taken under 5 U.S.C., Chapter 43
 - Adjudicates cases brought by the Office of Special Counsel (OSC), such as whistleblower claims, allegations of mismanagement, requests by SES members for performance deficiencies and for informal hearings and appeals concerning RIFs

- Equal Employment Opportunity Commission (EEOC)
 - Adjudicates claims of unlawful discrimination based on race, religion, national origin, sex (including pregnancy, sexual orientation and sexual stereotyping), color, disability, or age, and claims of unlawful reprisal. The EEOC will also adjudicate claims filed under Genetic Information Nondiscrimination Act (GINA) which prohibits an agency from using genetic information to make decisions related to any terms, conditions, or privileges of employment (e.g., hiring, firing, and opportunities for advancement).
 - If illegal discrimination is found, it may order back pay, retroactive personnel actions, correction of records, reinstatement, promotion, payment of attorney fees, and compensatory damages
- Federal Labor Relations Authority (FLRA)
 - Administers the interaction between federal agencies, labor organizations and employees
 - Decides unfair labor practice (ULP) cases filed by either the agency or the union
 - Decides appeals of certain arbitration awards and negotiability appeals
 - Has authority to direct the Air Force and Space Force to comply with its orders
- Federal Service Impasses Panel (FSIP): Resolves negotiation impasses between agencies and labor organizations
- Federal Mediation and Conciliation Service (FMCS): Aids federal agencies and labor organizations in resolving negotiation impasses; provides parties with lists of arbitrators; provides mediators for alternative dispute resolution
- Office of Personnel Management (OPM): Manages civil service of the federal government such as recruitment, civil service retirement programs, health insurance, examinations, and classification appeals
- Office of Special Counsel: Investigates and prosecutes allegations of violations of merit principles; prohibited personnel practices; fraud, waste and abuse; and violations of the Hatch Act

REFERENCES

- Merit Systems Protection Board, Office of Special Counsel, and Employee Right of Action, 5 U.S.C. §§ 1201-1204
- Performance Appraisal, 5 U.S.C. §§ 4301-4315
- Employee Classification Act, 5 U.S.C. §§ 5101-5115
- Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
- Adverse Actions, 5 U.S.C. §§ 7501-7515
- Defense of Defense Personnel Authorities, 5 U.S.C. § 9902
- 5 C.F.R. Part 1201 (2011)
- 29 C.F.R. Part 1614 (2020)
- DoDI 1400.25, Volume 771, *DoD Civilian Personnel Management System: Administrative Grievance System* (26 December 2013), incorporating Change 1, 13 June 2018
- AFI 36-701, *Labor-Management Relations* (14 November 2019)
- AFI 36-704, *Discipline and Adverse Actions of Civilian Employees* (3 July 2018)
- AFI 36-2710, *Equal Opportunity Program* (18 June 2020), including AFI36-2710_AFGM2020-01 (9 September 2020)
- AFI 51-301, *Civil Litigation* (2 October 2018)

OVERVIEW OF FEDERAL LABOR MANAGEMENT RELATIONS

Labor law concerns relationships among management, employees, and unions. Generally, it covers the rules that govern how employees and managers should work together to accomplish the mission.

- Employee Rights: The Federal Service Labor-Management Relations Statute (FSLMRS) recognizes certain employee rights; namely: (1) the right to form, join or assist any union, or to refrain from any such activity, freely and without fear of penalty or reprisal (no right to strike); (2) to serve as representative of a union; (3) to present union views to management; and (4) to engage in collective bargaining about conditions of employment (COE) through chosen representatives
- Management Rights: The FSLMRS similarly recognizes certain rights that are reserved to management. When the agency exercises a right reserved to management, the agency is not required to bargain over the substance of that decision. However, the agency is required to bargain over any legitimate proposals that the union submits concerning the impact or implementation of the agency's decision to exercise a reserved management right. Some of the reserved management rights include the right to determine agency mission, budget, organization, number of employees, internal security practices, to hire/assign/direct/retain/promote/discipline employees, to assign work, and make determinations on outsourcing.
- Union Representation Rights and Duties: A union is entitled to negotiate a collective bargaining agreement (CBA) covering employees in a unit. Installations are represented by a base negotiating team. A union may designate its representative during the negotiations.
 - Both sides must negotiate in good faith (duty to approach negotiations with sincere resolve to reach an agreement). A union representative is entitled to be present during *formal discussions* between one or more representatives of the Department of the Air Force and one or more employees in the bargaining unit (or their representatives) concerning any grievance or any personnel policy or practices or other general COE.
 - There are a number of factors that can be considered to determine if the discussion is *formal*. Some of the factors include who called the meeting, where the meeting was held, how long the meeting lasted, whether there was a formal agenda, whether attendance was mandatory, and how the meeting was conducted. *Discussion* is synonymous with *meeting* and does not require debate or argument. Commanders and supervisors should consult with their local civilian personnel office (CPO), Labor Relations Officer (LRO), and the staff judge advocate (SJA) before conducting such discussions to see if the union should be notified.
 - A union representative is entitled to be present during an investigatory interview of a bargaining unit employee if the employee reasonably believes that the examination may result in disciplinary action against the employee **AND** the employee requests representation. This is known as receiving *Weingarten Rights* in accordance with the Supreme Court case, *Nat'l Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1975).
 - Generally, management does not have to advise the employee of these rights at the beginning of each interview unless the CBA between management and the union requires it
 - Two executive orders, Executive Orders 12171, *Exclusions from the Federal Labor-Management Relations Program*, and 13760, *Exclusions from the Federal Labor-Management Relations Program*, exclude (exempt) interrogations of bargaining unit employees conducted by the Air Force Office of Special Investigations (AFOSI) from *Weingarten* case law and Federal Labor Relations Authority (FLRA) statute

- A union is entitled to information “normally maintained by the agency in the regular course of business” that is “reasonably available and necessary” for full and proper negotiation and not prohibited from disclosure by law. A union is not required to file a request pursuant to the Freedom of Information Act (FOIA) for this information. Undue delay, failing to explain a denial, or failing to advise the union that the information does not exist, may be grounds for an unfair labor practice (ULP).
- Executive Order 13837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, requires agencies to ensure union time is used efficiently and authorized in amounts that are reasonable, necessary, and in the public interest
 - Union representatives are entitled to wages when on official time to negotiate collective bargaining issues (e.g., ground rules for negotiations, CBA negotiations, mid-term negotiations, or impact/implementation bargaining)
 - The union has a statutory right to official time for as many negotiators as are on the management negotiating team, although the union has the right to negotiate official time for additional negotiators as well
 - Official time shall not be used for internal union business (collecting dues, soliciting new members, etc.). Official time must be granted for any employee participating in any phase of a FLRA proceeding if the FLRA determines the employee’s presence is necessary. Official time for other purposes is bargainable and the CBA should outline who is entitled to the official time and how much time they are entitled to receive.

Unfair Labor Practices (ULP)

- It is an unfair labor practice (ULP) for agency management to:
 - Interfere with, restrain, or coerce employees in exercising their FSLMRS rights. Lack of illegal motivation or anti-union animus is not a defense.
 - Encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment
 - Sponsor, control, or assist a union
 - Discipline or otherwise discriminate against an employee for filing a ULP or testifying in a ULP proceeding
 - Refuse to bargain in good faith, to include failing or refusing to cooperate in impasse procedures or decisions
 - Enforce a rule or regulation which conflicts with a preexisting CBA
 - Otherwise fail or refuse to comply with any provision of FSLMRS
- It is a ULP for a union to:
 - Coerce, discipline, or fine a union member as punishment to hinder or impede an employee’s work performance
 - Discriminate regarding union membership on basis of race, creed, color, sex, age, handicap, marital status, national origin, or political affiliation
 - Call, participate in, or condone a strike, work stoppage, or slowdown. Non-disruptive informational picketing is permitted.

- Refuse to bargain in good faith, to include failing or refusing to cooperate in impasse procedures or decisions
- Otherwise fail or refuse to comply with any provision of FSLMRS
- **ULP Procedures:** A ULP charge will be filed with FLRA regional office. The investigation is conducted by the FLRA regional office attorney/agent.
 - Investigations may be conducted in person or by interviewing witnesses over the phone
 - The Department of the Air Force must make bargaining unit employees available for interview
 - Investigators are **NOT** always neutral and detached (i.e., they may represent the agency)
 - Charges may be amended by investigator to conform to their investigation
- **NEVER** permit management officials to be interviewed without notifying the legal office.
 - With the exception of some bases within the Air Force Materiel Command (AFMC), the Department of the Air Force's Civil Law Domain's General Litigation Division
 - Labor Law Field Support Center (LLFSC) is designated as the agency representative for ULP charges
 - For those cases in which the LLFSC is designated as the agency representative, the LLFSC must be notified before management officials are interviewed by the FLRA

REFERENCES

Executive Order 12171, *Exclusions from the Federal Labor-Management Relations Program* (19 November 1979)

Executive Order 13760, *Exclusions from the Federal Labor-Management Relations Program* (12 January 2017)

Executive Order 13836, *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining* (25 May 2018)

Executive Order 13837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use* (25 May 2018)

Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135

NLRB v. Weingarten, Inc., 420 U.S. 251 (1975)

AFI 36-701, *Labor-Management Relations* (14 November 2019)

COLLECTIVE BARGAINING

The Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135) is contained in the Civil Service Reform Act of 1978. This Act grants certain federal employees the right to join or form labor unions and to engage in collective bargaining through their chosen representatives. Department of the Air Force labor-management relations policies and procedures are set forth in AFI 36-701, *Labor-Management Relations*.

- The Air Force and Space Force **must bargain** with bargaining unit employees through their duly elected representative (union) over all conditions of employment (COE), which are defined as personnel policies, practices, and matters affecting working conditions
- The Act **does not require bargaining** with appropriated fund employees over certain matters, including issues *specifically* regarding certain political activities, classification of positions, matters provided for by federal statute (e.g., pay, vacations, health benefits, holidays, or retirement plans), proposals that conflict with government-wide rules/regulations or that conflict with “reserved management rights” under the Act
- Management is not required to bargain over matters already covered in the contract or Collective Bargaining Agreement (CBA). To the extent a matter arises concerning a COE that is not covered in the contract, the union can engage management in mid-term bargaining. The union may not engage management in mid-term bargaining if the CBA contains a “zipper” clause that bars such during the life of the agreement.
- The Air Force and Space Force must bargain in good faith, including having negotiators who have authority to bind the activity. Additionally, the Air Force and Space Force must bargain before changing COE even if the change is made during the life of the CBA.
- Parties may establish a COE by consistently, over an extended period of time, engaging in a certain practice, and a labor contract clause can be modified or even overturned by such a COE created in this manner (often called a “past practice”). This refers to matters that are already considered conditions of employment when the past practice has merely changed the way the condition of employment was originally handled. It is not possible for a past practice to create a condition of employment where the subject matter underlying the practice does not pertain to a COE.

Determining Whether an Issue is “Bargainable”

- Determining whether an issue is open for bargaining can be a confusing and highly complex matter in federal labor law
- Permissive subjects of bargaining under 5 U.S.C. § 7106(b)(1) have been narrowed by Executive Order 13836, *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining*, which took effect in October 2019 after protracted court battles
- If commanders are presented with a demand that a dispute or issue be dealt with through formal bargaining, the safe response is to advise the union representative that he/she will ask the civilian personnel section and staff judge advocate (SJA) to review the request. This area is sufficiently sensitive that wing staff organizations will coordinate a decision to declare a proposal “nonnegotiable” with MAJCOM Directorate of Civilian Personnel (DPC) and the Labor Law Field Support Center (LLFSC).

REFERENCES

Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135

Executive Order 13836, *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining* (25 May 2018)

AFI 36-701, *Labor-Management Relations* (14 November 2019)

AIR FORCE CIVILIAN DRUG TESTING PROGRAM

Executive Order 12564, *Drug-Free Federal Workplace* (1986), formally announced the President's policy that federal employees are required to refrain from the use of illegal drugs.

- President's Statement of Policy: Use of illegal drugs by federal employees, on or off duty, is contrary to the efficiency of the service and persons who use illegal drugs are not suitable for federal employment. Each agency must develop a plan to achieve the objectives of the Executive Order.
- Department of the Air Force Policy: The Air Force and Space Force, as a result of its national defense responsibilities and the sensitive nature of its work, has a compelling obligation to eliminate illicit drug use from its workforce. Use of illicit drugs is inconsistent with the high standards of performance, discipline, and readiness necessary to accomplish the Department of the Air Force's mission.
 - Civilian employees of the Air Force and Space Force must refrain from illicit drug use, whether on or off duty
 - Performing duties under the influence of illicit drugs adversely affects personal safety, risks damage to government property, significantly impairs day-to-day operations, and exposes sensitive information to potential compromise
- Air Force and Space Force policy is based on federal criminal statutes on controlled substances and is not affected by state laws legalizing the use of marijuana or other controlled substances, even if for medical use. Thus, in accordance with federal law, Air Force and Space Force civilians are prohibited from using marijuana, a Schedule I controlled substance.
- Specimens are tested for evidence of the consumption of certain drugs as authorized by the Department of Health and Human Services. With prior approval, drugs not on the standard panel of substances routinely tested can be requested.

Types of Drug Testing

- Random Drug Testing: Only employees in "sensitive positions," which are also known as testing designated positions (TDP), are subject to random drug testing
 - TDPs include positions that involve work that impacts national security, public health and safety, protection of life and property, or otherwise require a high degree of trust and confidence
 - Any testing requirement must be identified in a position description and vacancy announcement (if applicable)
 - Applicants for such positions are also subject to testing after tentative selection. If a non-TDP employee becomes a TDP employee, 30 days' notice must be provided to the employee before random testing may begin.
- Reasonable Suspicion Testing: An Air Force or Space Force employee can be tested based on reasonable suspicion that the employee has engaged in illicit drug use and that evidence of such use is presently in the employee's body
 - Reasonable suspicion is a specific and fact-based belief that an employee has engaged in illicit drug use and that evidence of illicit drug use is presently in the employee's body, drawn from specific and particularized facts, and from reasonable inferences based on those facts
 - Employees in TDPs may be tested on a reasonable suspicion of illicit drug use on or off duty. Employees in non-TDPs may be tested based upon reasonable suspicion only when the supervisor suspects on-duty drug use or impairment.

- Examples of evidence that may justify reasonable suspicion testing include, but are not limited to:
 - Direct observation of illicit drug use or possession and/or physical symptoms of being under the influence of an illegal drug, including behavior, speech, appearance, and/or body odors of the employee
 - A pattern of abnormal conduct or erratic behavior consistent with the use of illegal drugs where no other rational explanation or reason for the conduct is readily apparent
 - Evidence of drug-related impairment supported by hearsay from identified or unidentified sources supported by corroboration from a manager or supervisor with training and experience in the evaluation of drug-induced job impairment
 - Recent arrest or conviction for a drug-related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking
 - Information of illicit drug use provided by a reliable and credible source or independently corroborated
 - Evidence that the employee has tampered with or avoided a recent or current drug test
- A basic overview of the procedure for reasonable suspicion testing is as follows:
 - A supervisor in the employee's chain gathers all information, facts, and circumstances supporting the suspicion and documents it in a timely manner. The memorandum must include, at a minimum, the appropriate dates and times of reported drug-related incidents and the reliable/credible sources of information considered (i.e., the rationale leading to the test). This memorandum must be maintained by the installation Drug Demand Reduction Program office for at least two years.
 - Supervisor coordinates with the installation staff judge advocate (SJA), Civilian Personnel/Human Resources, and a higher-level supervisor in the functional chain of command to determine whether reasonable suspicion exists in any given case
 - The supervisor notifies the employee in writing of the requirement to provide a urine specimen. The notice to the employee will specify that the basis for the test is reasonable suspicion of illicit drug use. A sample of this notification letter is contained in Attachment 6 of AFMAN 44-198, *Air Force Civilian Drug Demand Reduction Program*.
- Consent Testing:
 - All Air Force and Space Force civilian employees may be asked to consent to testing for illicit drug use
 - Prior to requesting such consent, supervisors must consult with the installation SJA
 - Consent testing may be requested if reasonable suspicion does not exist or before the employee is ordered to test based on reasonable suspicion
 - Employee's consent must be knowing and voluntary
 - Positive test results on consent-based tests do not exempt the employee from disciplinary action. Specifically, any illicit drug found in the specimen of an employee as a result of consent drug testing may not be used in a criminal action against the employee, but may be used as the basis to support disciplinary/adverse and/or administrative action against the employee.

- Accident and Safety Mishap Testing:

- It is the Department of the Air Force's policy that employees will be subject to testing for evidence of illicit drug use if the employee's supervisor reasonably concludes an employee's conduct may have caused or contributed to a mishap defined as Class A, B, or nuclear by AFI 91-204, *Safety Investigation and Hazard Reporting*
 - Air Force and Space Force employees may also be subject to drug testing when, based upon the circumstances of an accident, their actions are reasonably suspected of having caused or contributed to an accident that meets certain criteria outlined in DoDI 1010.09, *DoD Civilian Employee Drug-Free Workplace Testing Program*
 - Supervisors should consult organizational personnel, medical, legal, and safety experts in making a determination regarding mishap testing of employees
- Rehabilitation (Follow-up) Testing: Employees referred for counseling or treatment for illicit drug use will be subject to unannounced testing for a minimum of one year from the time of initiated rehabilitation services
- **Failure** of an employee **to appear** for a drug test may be considered refusal to participate in drug testing and may subject an employee to the full range of administrative and/or disciplinary actions, up to and including removal

Personnel Actions on Finding of Illegal Drug Use

- Potential actions upon a finding of illegal drug use include temporary reassignment and denial of access to classified information (if applicable), removal from TDP, disciplinary actions initiated under AFI 36-704, *Discipline and Adverse Actions of Civilian Employees*, and other applicable guidance depending on the type of employee in issue (i.e., appropriated fund or non-appropriated fund employee). The range of disciplinary actions includes reprimand to removal for drug use, drug possession, or failure to take test.
- Safe Haven Provision: Disciplinary action for illicit drug use will **NOT** be initiated if the civilian employee (1) voluntarily admits drug use prior to being notified of requirement to provide a specimen and prior to being identified through other means such as a drug investigation, (2) obtains and cooperates with appropriate counseling or rehabilitation, (3) signs an agreement (called last chance agreement) to refrain from further drug use **AND** (4) refrains from further use of illegal drugs
- Executive Order 12564 requires management to propose appropriate disciplinary action against an employee for any one of the following reasons:
 - Refusing to obtain counseling and treatment through a treatment program as required by the Executive Order after having been found to have engaged in illicit drug use
 - Continued illicit drug use after a first offense of illicit drug use
 - Altering or attempting to alter a urine specimen or substituting or attempting to substitute a specimen for their own or that of another employee
 - Failing to successfully complete the mandated and/or agreed upon medically approved drug rehabilitation program
- As with any kind of disciplinary action taken against a civilian employee, SJA involvement is strongly encouraged

REFERENCES

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C.)

Executive Order 12564, *Drug-Free Federal Workplace* (15 September 1986)

DoDI 1010.09, *DoD Civilian Employee Drug-Free Workplace Testing Program* (22 June 2012), incorporating Change 1, 28 June 2018

U.S. Office of Personnel Management Memorandum for Heads of Executive Departments and Agencies, *Federal Laws and Policies Prohibiting Marijuana Use* (26 May 2015)

AFI 36-704, *Discipline and Adverse Actions of Civilian Employees* (3 July 2018)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018), incorporating Change 1, 21 November 2019, with Corrective Actions Applied, 19 December 2019

AFI 91-204, *Safety Investigation and Hazard Reporting* (27 April 2018), including AFI91-204_AFGM2020-01, 7 July 2020

AFMAN 44-198, *Air Force Civilian Drug Demand Reduction Program* (24 January 2019)

CIVILIAN EMPLOYEE WORKPLACE SEARCHES

The general rule is that a government search of private property without proper consent is unreasonable and unconstitutional under the Fourth Amendment to the U.S. Constitution unless the search is authorized by a valid search warrant. However, the government employer can, in some instances, conduct a warrantless search of an employee's workplace for "work-related" purposes such as to retrieve government property or to investigate work-related misconduct.

- In the leading case on workplace searches, *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Supreme Court recognized that government employees may have a reasonable expectation of privacy in their work areas, which may be protected from warrantless searches by a government employer and law enforcement
- Government offices are provided to employees for the purpose of facilitating the work of an agency. Employees may avoid exposing personal belongings at work by simply leaving them at home.
- Government searches to retrieve work-related materials or to investigate violations of workplace rules do not violate the Fourth Amendment. Hence, supervisors are generally not required to obtain a search warrant when they need to enter an employee's desk, office, or file cabinet.
- Personal handbags, luggage, and briefcases are **NOT** typically considered part of the workplace and, therefore, a search warrant or search authorization is generally required before searching them
- Consult the staff judge advocate (SJA) before proceeding with any search and seizure action

REFERENCES

U.S. Const. Amend. IV

O'Connor v. Ortega, 480 U.S. 709 (1987)

CIVILIAN EMPLOYEE DISCIPLINE

- Disciplinary action or adverse action must be taken without regard to marital status, political affiliation, race, color, religion, sex, disability, national origin, age, or prior engagement in protected equal employment opportunity (EEO) activity. Adverse action based on disability is not taken when the employee can perform the essential functions of his/her job either with or without a reasonable accommodation.
- Disciplinary action or adverse action should be taken to promote the efficiency of the service, and carried out promptly and equitably. Disciplinary actions and adverse actions are personal matters and are carried out confidentially.
- Some types of adverse actions are appealable to the Merit Systems Protection Board (MSPB). These include removals, suspensions for more than 14 days, furloughs for 30 days or less, and reductions in grade or pay.
- Adverse actions may or may not be for disciplinary reasons

Authority and Requirements

- All Air Force and Space Force commanders and supervisors are delegated authority to take disciplinary and adverse action when necessary. AFI 36-704, *Discipline and Adverse Actions of Civilian Employees*, covers all competitive and excepted service employees paid from appropriated funds. AFI 34-301, *Nonappropriated Fund Personnel Management and Administration*, covers nonappropriated fund employees.
- Management may take a disciplinary or adverse action only for such cause as will promote the efficiency of the service, unless the action is being taken for unacceptable performance, in which case different standards apply
- Management may not take an action that would result in a prohibited personnel practice. A prohibited personnel practice is an adverse action taken against an employee for an illegal or inappropriate reason, such as reprisal or discrimination.

Procedures

- Management Procedures (absent a local collective bargaining agreement that contains other provisions)
 - Gather the facts and interview the employee if necessary. A bargaining unit employee has rights (called *Weingarten Rights*) to have union representation if the employee believes disciplinary action could result from questioning from his/her employer **AND** he/she requests a union representative.
 - Consult with the civilian personnel section and the staff judge advocate (SJA) to consider options and determine what action is appropriate
 - The civilian personnel section will prepare, and the SJA will review, the notice letter of adverse and/or disciplinary action for signature by the “**proposing official**” (normally a first or second level supervisor). The Labor Law Field Support Center (LLFSC) will also review the notice letter if the disciplinary action is adverse and appealable to the MSPB.
 - The notice must include all aggravating factors considered by the proposing official (e.g., prior discipline, poor performance, seriousness of the alleged offense). There are limitations on what prior discipline may be considered. For instance, admonishments and reprimands must have occurred within the last two years.

- The **employee** gets a reasonable amount of time, but not less than seven days to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer
- The **“deciding official”** makes the final decision. This is usually the supervisor one level up from the proposing official (but may be the same person). The final decision is effective no earlier than 30 days after the notice is given to the employee.
- The deciding official must document his/her consideration of the *Douglas Factors* governing appropriate penalty selection. *Douglas Factors* are those factors that management must consider before taking disciplinary actions. They include, for example, the seriousness of the misconduct, the work record of the employee, and other similar considerations. See AFI 36-704. Consult the civilian personnel section and SJA for assistance in preparing this document.

Air National Guard Technicians and National Guard Employees

- Title 32 Air National Guard Technician and Title 5 National Guard employee discipline is covered under CNGBI 1400.25 Vol 752. The instruction discusses the procedures for non-disciplinary adverse administrative actions (e.g., letters of counseling, admonition, and reprimand) and disciplinary actions (removal, suspension, reduction in grade, and reduction in pay) for Title 32 Air National Guard Technicians and Title 5 National Guard employees.

Air Reserve Technicians (ARTs)

- Air Reserve Technicians (ARTs) are “dual status” federal civilian employees and members of the Selected Reserve. As a condition of federal civilian employment, ARTs must maintain membership in the Selected Reserve. ART positions within the Selected Reserve span a broad spectrum to include command billets.
- ARTs who are in the military status performing duty for pay/points are subject to the UCMJ
- ARTs who are in federal civilian employee status are not subject to the UCMJ. However, they are subject to all civilian employee disciplinary measures discussed in this section. Additionally, an ART in civilian employee status may be subject to military administrative actions such as letters of counseling, admonishment, or reprimand (LOC/LOA/LOR), demotion, and discharge.
 - Military administrative discharge of an ART will lead to the loss of a condition of employment of an ART’s civilian employee position and adverse action is appropriate
- ART commanders must be in military status when taking certain actions such as preferral/referral of charges, Article 15, UCMJ, nonjudicial punishment actions, urinalysis testing, and command directed investigations (CDIs). Consult with your local SJA for guidance regarding actions in which military status is relevant.

REFERENCES

- Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981)
- AFI 34-301, *Nonappropriated Fund Personnel Management and Administration* (1 July 2019)
- AFI 36-704, *Discipline and Adverse Actions of Civilian Employees* (3 July 2018)
- AFRCI 36-114, *Procedures on Air Reserve Technicians (ARTs) Who Lose Active Membership in the Reserve* (29 January 2020)
- CNGBI 1400.25, Vol. 752, *National Guard Technician and Civilian Personnel Discipline and Adverse Action Program* (29 June 2020)

CIVILIAN EMPLOYEE INTERROGATION

In 1975, the U.S. Supreme Court, in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), detailed the right of an employee to have union representation present if the employee believes disciplinary action could result from questioning by his/her employer and if the employee requested the presence of a union representative. These rights are commonly known as *Weingarten Rights*. This section outlines the employee's rights during an interrogation. It is important to note that these rights do not apply to interrogations by the Air Force Office of Special Investigations (AFOSI). However, 5 U.S.C. § 7103(b)(1) allows the President, by Executive Order, to exempt any agency, or part of an agency, from the Federal Service Labor Management Relations statute if he determines that it has a primary function of intelligence, counterintelligence, investigative, or national security work and the application of the statute would be unduly disruptive. This was accomplished in Executive Order 12171, *Exclusions from The Federal Labor-Management Relations Program* (see paragraph 1-206(g) which specifically excludes AFOSI).

- Both the union and the employee's right to union representation in connection with an investigation are applicable when four conditions are present:
 - A meeting is held in which management questions a bargaining unit employee;
 - The examination is in connection with an investigation. It does not have to be a Security Forces or other formal investigation; however, Executive Order 12171 exempts AFOSI, when acting under its independent mandate to conduct criminal and security investigations, from the FLRA. In such criminal investigations, AFOSI is not obligated to honor an employee's request for representation.
 - The employee reasonably believes that discipline could result from the examination; and
 - The employee requests representation
- The role of the union representative during the interview is to clarify the facts and the questions, help the employee express his/her views, suggest other avenues of inquiry, suggest other employees who may have knowledge of the facts, and ensure the employer does not initiate or impose unjust punishment. There may also be a right for the union representative and the employee to confer in private, but this depends on the nature of the case.
- Agencies must announce this right on an annual basis at all places where employees normally receive employment information
- Individuals being investigated may not serve as representatives for other employees being investigated until their own investigations are completed
- Management cannot tell a union representative to remain silent or not to offer advice. The employer may place reasonable limitations on a union representative's role to prevent adversarial confrontation, but aggressive, unreasonable management behavior interferes with the right to union representation. This is an unfair labor practice (ULP).
- Once an employee requests a union representative, management may either grant the request, suspend the interview, or give the employee the choice of having an interview without a union representative or having no interview
- Civilian employees also have a legal obligation to account for the performance of their duties and a failure to provide desired information can serve as a basis for removal under certain circumstances. However, an employee cannot be discharged simply because he/she invokes his/her Fifth Amendment privilege against self-incrimination nor can statements coerced by a threat of removal be used against the employee in a subsequent prosecution. An employee **CAN** be removed for not replying if he/she is adequately informed both that he/she is subject to discharge for not answering and that his/her replies cannot be used against him/her in a criminal case.

- Any desire to offer immunity to an employee must be coordinated with the staff judge advocate (SJA) who will consult with (and possibly get approval from) the Department of Justice and/or U.S. Attorney
- A bargaining unit employee also has the right to be advised of the consequences of participating or not participating in an interview for a third-party proceeding (unfair labor practice hearing, arbitration, Merit Systems Protection Board (MSPB) hearing, etc.), and failure to do so can be an unfair labor practice (ULP) by management. These rights are known as *Brookhaven* rights, from *IRS and Brookhaven Service Center*, 9 F.L.R.A. 930 (1982), and the employee must be advised of:
 - The purpose of the interview;
 - That no reprisal will take place if the employee refuses to participate; and
 - Participation is voluntary
- The interview cannot be coercive in nature. Questions must not exceed the scope of the legitimate purpose of the inquiry and cannot otherwise interfere with the employee's statutory rights.

REFERENCES

Federal Labor Relations Act, 5 U.S.C. § 7103(b)(1)

Representation Rights and Duties, 5 U.S.C. § 7114(a)(2)(B)

Unfair Labor Practices, 5 U.S.C. § 7116(a)(1)

Executive Order 12171, *Exclusions from the Federal Labor-Management Relations Program* (19 November 1979)

Executive Order 13760, *Exclusions from the Federal Labor-Management Relations Program* (12 January 2017)

NLRB v. Weingarten, Inc., 420 U.S. 251 (1975)

Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968)

Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973)

Internal Revenue Service, Brookhaven Service Center and National Treasury Employees Union (NTEU), 9 FLRA 930 (1982)

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ENVIRONMENTAL LAWS – OVERVIEW

Federal, state, and local environmental laws and regulations are intended to protect human health and the environment. While carrying out this function, these laws and regulations frequently also limit commander options. Failure to comply with applicable environmental laws and regulations will frequently inhibit full mission accomplishment and can severely impact installation resources. Moreover, commanders can be held criminally liable for violations. Familiarization with this chapter is crucial to a commander's ability to minimize negative impacts to the mission and to the environment.

Environmental Statutes

- Federal statutes now cover virtually all major environmental issues
 - Exemptions from federal statutes and rules are rare because they usually require personal action by the President or the Secretary of Defense (SecDef)
 - Most major federal environmental statutes waive federal government immunity from state and local pollution control regulations (including permitting and procedural requirements) and substantive pollution control standards
 - Most statutes subject the Air Force and Space Force to state and local enforcement
 - The Air Force and Space Force are also subject to state and local fines and penalties for violations of requirements related to hazardous waste, underground storage tanks, drinking water, lead-based paint, and others
 - Most statutes subject Air Force and Space Force personnel to criminal liability for violations of environmental laws and regulations
- Federal environmental statutes usually establish a joint federal-state system of pollution control. In addition, state authority allows delegation to local regulatory agencies.
 - The typical role of the federal government is to establish the basic pollution control standards and to ensure that the states achieve those standards
 - Most states have been delegated authority to establish standards for particular sources of pollution, integrate the individual controls into an overall plan to achieve the federal standards, and enforce controls on a daily basis

Enforcement Authority

- Three levels of enforcement authority typically apply:
 - U.S. Environmental Protection Agency (EPA): Retains authority to enforce when it has not delegated that authority to the relevant state or when it learns of violations not being prosecuted or otherwise dealt with by a delegated state
 - State or Local Enforcement Agencies: Have primary responsibility for taking administrative or judicial actions for most violations
 - Private Citizens: When federal, state, or local enforcement authorities have failed to abate violations, most environmental statutes allow private citizens to initiate civil enforcement proceedings in a federal district court

Assistance

- The base has a number of offices with expertise in environmental matters. These offices typically include civil engineering, staff judge advocate (SJA), bioenvironmental engineering, medical, safety, and others.

- Required meetings of the installation Environment, Safety and Occupational Health Council (ESOHC), which is normally chaired by the vice commander, will assist leadership in addressing environmental issues

Overseas

- Environmental requirements for U.S. forces outside the states, territories, and possessions that comprise the United States are determined primarily by treaties and international agreements, DoD and geographic combatant command policies, and service and subordinate command directives. Few U.S. environmental laws apply outside the United States and those that do apply extraterritorially are incorporated into DoD policy for overseas installations and operations.

REFERENCES

32 C.F.R. Part 187

32 C.F.R. Part 989

DoDI 4165.69, *Realignment of DoD Sites Overseas* (6 April 2005), incorporating Change 1, 31 August 2018

DoDI 4715.05, *Environmental Compliance at Installations Outside the United States* (1 November 2013), incorporating through Change 2, 31 August 2018

DoDI 4715.08, *Remediation of Environmental Contamination Outside the United States* (1 November 2013), incorporating through Change 2, 31 August 2018

DoDI 4715.19, *Use of Open-Air Burn Pits in Contingency Operations* (13 November 2018)

DoDI 4715.22, *Environmental Management Policy for Contingency Locations* (18 February 2016), incorporating through Change 2, 31 August 2018

Air Force Handbook (AFH) 32-7084, *AICUZ Program Manager's Guide* (2 November 2017)

AFI 32-7001, *Environmental Management* (23 August 2019), including AFI32-7001_AFGM2020-01, 21 October 2020

AFI 32-7020, *Environmental Restoration Program* (12 March 2020), including DAFI32-7020_AFGM2020-01, 15 December 2020

AFI 32-7091, *Environmental Management Outside the United States* (13 November 2019)

AFMAN 32-1067, *Water and Fuel Systems* (3 August 2020)

AFMAN 32-7002, *Environmental Compliance and Pollution Prevention* (3 February 2020)

AFMAN 32-7003, *Environmental Conservation* (20 April 2020)

AFI 90-801, *Environment, Safety, and Occupational Health Councils* (9 January 2020)

AFH 10-222, vol 4, *Environmental Considerations for Overseas Contingency Operations* (1 September 2012)

CONTROLS ON AIR FORCE AND SPACE FORCE DECISION-MAKING – NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

The National Environmental Policy Act (NEPA) requires federal agencies to evaluate environmental impacts as part of their overall planning and decision-making process. It also requires the public be informed of, and involved in, the decision-making process. Failure to properly follow NEPA planning may result in a court halting the project until the NEPA process is complete. This section is limited to NEPA procedural requirements within the jurisdiction of the United States and United States territories.

Implementation

- Within the Air Force or Space Force, NEPA's mandates are carried out through the Environmental Impact Analysis Process (EIAP) found at 32 C.F.R. Part 989
- A review is required for any *“major federal action significantly affecting the quality of the human environment.”* This includes both projects proposed by the AF and private actions essentially under Air Force or Space Force “control” (e.g., actions requiring Air Force or Space Force permission).
 - “Major” refers to impact on the environment, not to the size of the project; thus, even a small project can qualify as “major”
 - Impacts may be significant based on context and intensity
 - The term “human environment” includes the natural and physical environment, as well as the relationship of people with that environment
- Generally, the Air Force and Space Force may not irretrievably commit money or resources for any proposed action until the EIAP is completed
- Presence of wetlands or floodplains may require additional documentation and MAJCOM approval
- Presence of classified information does not exempt the Air Force or Space Force from its NEPA responsibilities, but it may modify the public's right to participate in the NEPA process. Unclassified portions of the required analysis are shared with the public.
- The Air Force and Space Force are prohibited from supporting or taking any action affecting air quality in a nonattainment or maintenance area (e.g., construction, weapon system bed-down, mission realignment, training exercise, etc.) which does not conform to a State Implementation Plan (SIP)
 - This requirement is called “general conformity” and requires the Air Force and Space Force to demonstrate the proposed action will not hinder attainment or maintenance of air quality standards
- Endangered Species Act and National Historic Preservation Act consultation, if required, must be complete prior to completing the environmental review
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, requires federal agencies to consider effects of proposed projects on minority and low-income populations
- Failure to follow EIAP can result in the action being delayed by litigation challenging the adequacy of the NEPA documentation
 - A reviewing court's focus will be whether the Air Force or Space Force has taken a “hard look” and made a good faith assessment of potential impacts to the environment and whether reasonable alternatives were considered

Level of Environmental Review

- A **Categorical Exclusion** (CATEX) is used for actions that do not individually or cumulatively have potential for significant effect on the environment and require no further environmental analysis (see 32 C.F.R. Part 989, Appendix B, for a list of CATEXs)
 - When application of a CATEX must be documented, an AF Form 813, Request for Environmental Impact Analysis is used
 - If a proposed action does not lead to a CATEX, the Air Force and Space Force must determine whether to prepare an environmental assessment (EA) or an environmental impact statement (EIS)
- An **Environmental Assessment** (EA) is used for actions that are not expected to have a significant environmental impact
 - An EA is similar to an EIS in that both consider alternatives and impacts, but the EA is substantially shorter and has fewer opportunities for public comment/participation
 - Every EA concludes either with a Finding of No Significant Impact (FONSI) or a decision to prepare an Environmental Impact Statement
- An **Environmental Impact Statement** (EIS) is required for actions expected to have a significant impact
 - The heart of an EIS is the identification and analysis of alternatives. A range of reasonable alternatives satisfying the purpose and need of the proposed action must be analyzed, and must include a “No Action” alternative.
 - An EIS concludes with the signing of a Record of Decision (ROD)

NEPA is a Procedural Law

- The Air Force and Space Force must ensure environmental concerns are given “appropriate consideration,” but NEPA does not require the Air Force or Space Force to rank environmental concerns above mission goals
- The Air Force and Space Force must ensure all reasonable measures are considered to mitigate adverse environmental impacts associated with an action it has chosen to implement
 - An EIS or EA/FONSI should clearly identify mitigation measures
 - A ROD must state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted or, if not, why they were not
 - If mitigation measures are proposed, proponents must prepare a mitigation plan and submit it to HQ USAF/A4CI for each FONSI or ROD containing mitigation measures

REFERENCES

National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*

40 C.F.R. Parts 1500-1508

32 C.F.R. Part 989

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (11 February 1994)

ENVIRONMENTAL MANAGEMENT SYSTEM (EMS), ENVIRONMENTAL INSPECTIONS, AND THE ENVIRONMENT, SAFETY, AND OCCUPATIONAL HEALTH (ESOH) COUNCIL

The Air Force and Space environmental management system (EMS) is a framework for continual program and process improvement through clearly defined environmental roles and responsibilities, planning requirements, budgeting, effective implementation and operation, and management review. The Air Force and Space Force are committed to three priorities: compliance, risk reduction, and continuous improvement. The Environment, Safety, and Occupational Health (ESOH) Council is a steering group which establishes goals, monitors progress, and advises installation senior leadership. Inspections and ESOH Council activities are part of EMS.

EMS

- EMS incorporates business processes and business rules for managing and reducing environmental risk. All personnel have a role in their installation's EMS.
 - EMS drives continuous improvement for all Air Force and Space Force environmental programs
 - EMS is a management tool for focusing resources and accomplishing core goals of mission sustainability and readiness
 - EMS is based on the International Organization for Standardization (ISO) 14001, *Environmental Management Systems* standard
 - EMS uses a "Plan, Do, Check, Act" approach (see Figure 16.1)
 - eDASH, an Internet-based document control system maintained by the Air Force Civil Engineer Center (AFCEC), implements EMS across the Air Force and Space Force

Environmental Inspections

- Installations will conduct EMS compliance and conformance self-assessments, and track preventative/corrective actions, in accordance with DoDI 4715.17, DoDI 4715.06, AFI 90-201, *The Air Force Inspection System*, AFI 90-801, *Environment, Safety, and Occupational Health Councils*, and other AF/A4C and AFCEC/CZ guidance

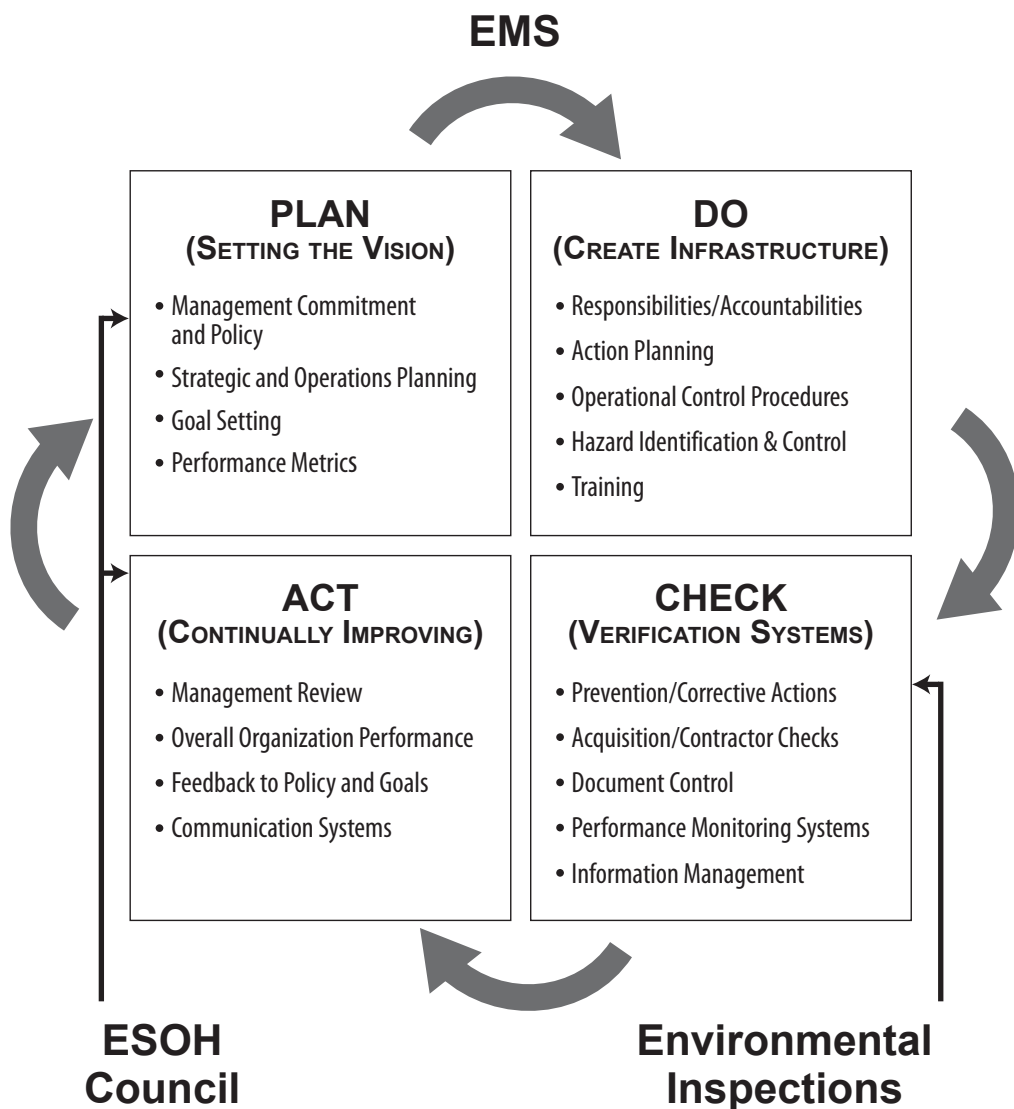
Release of Environmental Inspection Documents and Information

- Inspection documents and information must be managed and protected in accordance with applicable laws, regulations, and policies
 - The Freedom of Information Act (FOIA), 5 U.S.C. § 552; DoDM 5400.07, DoD *Freedom of Information Act Program*; DoDM 5400.07_AFMAN 33-302, *Freedom of Information Act Program*; and AFI 90-201 govern release of inspection records

ESOH Council

- The ESOH Council is the cornerstone of the ESOH program and provides senior leadership involvement and direction at all levels of command
 - Develop, approve, and monitor ESOH risk-based performance goals and objectives
 - Report annually on the progress of ESOH goals, as defined by next higher level ESOHC, and any issues requiring higher level assistance or direction until closure
 - Report annually to the next higher level ESOHC on the effectiveness of the management systems, evaluate high risk and/or problematic open findings, and track progress to correct validated deficiencies

Figure 16.1. Interaction of EMS, Environmental Inspections, and ESOH Council



REFERENCES

Freedom of Information Act, 5 U.S.C. § 552

DoDI 4715.05, *Environmental Compliance at Installations outside the United States* (1 November 2013), incorporating Change 2, 31 August 2018

DoDI 4715.06, *Environmental Compliance in the United States* (4 May 2015), incorporating Change 1, 31 August 2018

DoDI 4715.17, *Environmental Management Systems* (15 April 2009), incorporating Change 2, 31 August 2018

DoDM 5400.07, *DoD Freedom of Information Act (FOIA) Program* (25 January 2017) DoDM 5400.07_AFMAN 33-302, *Freedom of Information Act Program* (27 April 2018)

AFI 32-7001, *Environmental Management* (23 August 2019), including AFI32-7001_AFGM2020-01, 21 October 2020

AFI 90-201, *The Air Force Inspection System* (20 November 2018), including AFI90-201_AFGM221-01, 29 January 2021

AFI 90-801, *Environment, Safety, and Occupational Health Councils* (9 January 2020)

ISO 14001:2015(E), *Environmental Management Systems—Requirements with guidance for use* (September 2015)

INTERACTION WITH THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

The federal Occupational Safety and Health Administration (OSHA) establishes occupational safety and health (OSH) standards to ensure safe and healthy conditions in workplaces throughout the United States. OSHA enforces its standards through inquiries, inspections, investigations, and issuing citations for violation of OSHA standards.

Applicability of OSHA standards

- Federal agencies must provide safe and healthy working conditions for employees
- Federal agencies must establish and maintain OSH programs that obey OSHA standards or approved alternate standards
 - Does not apply to workplaces that use or handle Department of Defense (DoD) equipment, systems, and operations that are unique to national defense mission
 - E.g., military aircraft, ships, early warning systems, tactical vehicles, field maneuvers, naval operations, and flight operations
 - “Military unique” workplaces and places where only military members work do not have to obey OSHA standards
- AFI 48-145, *Occupational and Environmental Health Program*, specifies Air Force occupational and environmental health standards that apply to all military and civilian personnel
- AFMAN 91-203, *Air Force Occupational Safety, Fire and Health Standards*, provides Air Force industrial and ground safety policy that implements OSHA standards

Reporting Requirements

- 29 C.F.R. § 1904.39 requires prompt reporting of certain civilian or contractor incidents to OSHA that result from a work-related incident. Reporting is typically accomplished through the installation safety office.
 - Any death of an employee must be reported within 8 hours
 - Any in-patient hospitalization of one or more employees, any amputation, or the loss of an eye must be reported within 24 hours

Contact from OSHA

- There are four typical contacts a base may have with OSHA: (1) Inquiry; (2) Inspection; (3) Investigation; and (4) Citation
- Inquiry: Process that occurs in response to a complaint from a non-employee or when a complaint alleges a violation occurred, but there is no present danger to workers
- Inspection: On-site evaluation of workplace(s) that can be scheduled ahead of time or conducted unannounced under some circumstances
 - Inspections are triggered when OSHA receives a complaint from an employee or an employee’s representative, and OSHA believes a violation exists that exposes employees to risk of physical harm
 - Inspections are also triggered when OSHA receives a complaint that alleges imminent danger of death or serious injury exists
 - Inspections can result if OSHA is not satisfied with the installation’s response to an inquiry

- **Investigation:** In-depth look into a fatality or catastrophe caused by a workplace hazard. A catastrophe is defined as an incident resulting in hospitalization of three or more employees.
 - Goal of an investigation is to determine the cause of the incident, whether a violation of OSHA standards occurred, and any relationship between the violation and the incident
 - The Air Force and Space Force must investigate the incident and, upon request, provide OSHA with a report of the investigation's findings
 - The OSHA Area Director decides if OSHA will conduct an investigation of the incident
 - OSHA may conduct an independent investigation or participate in the Air Force or Space Force's investigation
- **Citation:** Issued using an OSHA-2H Form, *Notice of Unsafe or Unhealthful Working Conditions* (also known as an OSHA Notice)
 - Issued by OSHA Compliance and Safety Health Officer (inspector) or OSHA Area Director
 - Notifies agency of violations of OSHA standards, alternate standards, and/or 29 C.F.R. Part 1960
 - A copy of the citation must be posted at or near the location of each violation addressed in the citation
 - A copy of the citation must remain posted until the violation is abated or three working days, whichever date is later

Responses to OSHA

- **Inquiry and Citation:** The Air Force and Space Force reply should be responsive, respectful, timely, and sincere
 - Answer OSHA's questions and address OSHA's concerns
 - If a violation occurred, specify what has been done or what will be done to fix it and prevent a repeat occurrence
- **Inspection and Investigation:** During inspections and investigations, Air Force and Space Force representatives should be cooperative, respectful, and interested
 - Be open, facilitate site visits, interviews, and document reviews
 - Provide escorts for inspectors and investigators
 - Take pictures of whatever inspectors or investigators take pictures of and take samples of whatever OSHA samples
- Ensure the servicing legal office knows about and provides support regarding all OSHA contacts and responses

More on Citations

- Each specified violation normally will be categorized as willful, serious, or other-than-serious
 - **Willful Violation:** Exists when the employer knowingly failed to comply with a legal requirement or acted with plain indifference to employee safety
 - **Serious Violation:** Occurs when a workplace hazard could cause an accident or illness that would most likely result in death or serious physical harm and the employer knew of the hazard or could have known of the hazard

- Other-than-serious Violation: Occurs when a hazardous condition exists but would most likely not cause death or serious physical harm
- A repeated violation exists where a facility has been cited previously for the same or a substantially similar condition within the past three years
- An installation can appeal a citation or a failure of an informal conference to resolve issues
- OSHA cannot impose fines or penalties for violations by DoD Components
 - Federal agencies (except the United States Postal Service) do not pay fines or penalties for their violations of OSHA standards
 - Despite the fact fines and penalties cannot be imposed, installations may still be found to be in violation of OSHA standards

State OSH Regulations and Regulators

- Generally speaking, state OSH laws and regulations do not apply to Air Force and Space Force workplaces (except for contractors)
- Air Force and Space Force contractors are subject to federal and state OSH requirements

REFERENCES

- Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678
- Executive Order 12196, Occupational Safety and Health Programs for Federal Employees (1980)
- 29 C.F.R. § 1904.39 (2013)
- 29 C.F.R. Part 1960 (2010)
- 29 C.F.R. Part 1975 (2001)
- DoDD 4715.01E, *Environment, Safety, and Occupational Health (ESOH)* (19 March 2005), incorporating Change 2, 30 December 2019
- DoDI 6055.01, *DoD Safety and Occupational Health (SOH) Program* (14 October 2014), incorporating Change 2, 14 July 2020
- DoDI 6055.05, *Occupational and Environmental Health (OEH)* (11 November 2008), incorporating Change 2, 31 August 2018
- OSHA Instruction CPL 02-00-163, *Field Operations Manual (FOM)* (13 September 2019)
- AFI 32-7001, *Environmental Management* (21 October 2020), including AFI32-7001_AFGM2020-01, 21 October 2020
- AFI 48-145, *Occupational and Environmental Health Program* (11 July 2018)
- AFI 90-801, *Environment, Safety, and Occupational Health Councils* (9 January 2020)
- AFPD 90-8, *Environment, Safety & Occupational Health Management and Risk Management* (23 December 2019)
- AFPD 91-2, *Safety Programs* (3 September 2019)
- AFMAN 48-146, *Occupational & Environmental Health Program Management* (15 October 2018)
- AFMAN 91-203, *Air Force Occupational Safety, Fire and Health Standards* (11 December 2018), including AFMAN91-203_AFGM2020-01, 8 September 2020
- OSHA-2H Form, *Notice of Unsafe or Unhealthful Working Conditions*

ENVIRONMENTAL ENFORCEMENT ACTIONS

Environmental regulators issue enforcement actions to notify bases they have violated environmental requirements, what must be done to achieve compliance, and whether the base will be fined and/or penalized for the violation. Enforcement actions can be serious and costly, and trigger various immediate reporting requirements.

Receiving an Enforcement Action

- Enforcement actions may be issued by various regulatory agencies at all levels:
 - Federal (e.g., Environment Protection Agency, U.S. Army Corps of Engineers, Occupational Safety and Health Administration, etc.)
 - State (e.g., Texas Commission on Environmental Quality, Massachusetts Department of Environmental Protection, South Carolina Department of Health and Environmental Control, etc.)
 - Local (e.g., Hillsborough County Environmental Protection Commission, Stormwater Management Division of the Prince George's County Department of the Environment, etc.)
- Enforcement actions are sometimes called EAs, notices of violation (NOV), notices of non-compliance (NON), notices of deficiency (NOD), compliance agreements (CA), or consent orders (CO)
- Enforcement actions are often issued after an inspection, with or without notice
- Enforcement actions can be issued without an inspection based upon reports filed with the regulator (e.g., effluent limitations, spills, etc.). Also, a failure to report can result in an enforcement action.
- Depending on the nature of the violation, fines, and penalties (including supplemental environmental projects) may be assessed and are ultimately paid using installation O&M funds
- Regulators may seek injunctions to shut down operations
- Violations can lead to criminal penalties, such as imprisonment and fines
- Installations may be issued enforcement actions for acts of non-Air Force or Space Force personnel such as AAFES employees, contractor employees, property lessees, and other agency personnel

Reporting & Tracking Enforcement Actions

- The base Civil Engineer, Installation Management Flight (CEI) must timely notify the installation commander, the installation staff judge advocate (SJA), and the Air Force Civil Engineering Center Environmental Directorate (AFCEC/CZ) of any written notice of a non-compliance by a regulatory agency. Overseas locations notify the Air Force Civil Engineering Center Facility Engineering Directorate (AFCEC/CF) and Air National Guard installations notify the National Guard Asset Management Division Environmental Management Branch (NGB/A7AN).
- Base CEIs shall report all written notices, e-mail messages, field citations, and other correspondence from regulatory agencies pertaining to non-compliance with applicable environmental requirements within one business day through the Enforcement Actions, Spills and Inspections Environmental Reporting (EASIER) database
- The installation SJA or representative shall notify the Regional Counsel Office and the base CEI within one business day of receiving any notice of a non-compliance or obtaining knowledge of any potential non-compliance

- Bioenvironmental Engineers (BEs) must notify MAJCOM/BEs of any violation of potable water quality sampling within one business day and immediately implement public notification procedures required by the regulator

Responding to an Enforcement Action

- Respond in a timely manner, in writing, to the regulator who issued the enforcement action. Some may include a required response date. Continue good communication with the regulator throughout the process.
- Do not assume the base is subject to the rule or law you allegedly violated or that you are required to do what the regulator is telling you to do (like pay a fine or penalty). You must seek legal advice from your SJA to determine the validity of the EA.
- Do not agree to anything without coordinating with your SJA and AF/JAOE

Enforcement Action Process

- The Regional Counsel Office is the lead negotiator for all notices of violation in order to ensure consistency throughout the region
- Ensure a coordinated effort is made to preserve evidence and document site conditions, as it may be some time before the hearing
- Federal: an Environmental Protection Agency (EPA) “complaint” triggers a formal administrative process
 - The base **MUST** file an answer within 20 days
 - Failure to respond to a given allegation may be considered an admission of its truth
- State/local: the base should follow state or local rules if it receives an enforcement action from those agencies
- Payment: civil fines or penalties assessed as part of an enforcement action normally are the funding responsibility of the installation. Payment of fines or penalties must be approved by the AF/JAOE Division Chief a minimum of 10 business days prior to payment.

Avoiding Enforcement Actions in the Future

- Enforcement actions are not a foregone conclusion. Attention to certain details may avoid violations.
- Stress the importance to unit personnel of complying with all environmental and safety instructions (e.g., AFIs, Department of Defense (DoD) regulations, permits, material safety data sheets (MSDS), etc.)
- Be prepared for inspections by regulators
 - Conduct regular self-inspections
 - Know your weak areas
 - Complete the “easy fixes.” Do not wait to be directed.
 - “Neatness” in environmental operations and in record-keeping really does count
 - Have a no-notice inspection response plan ready to activate and exercise it

- Select and prepare a knowledgeable and professional escort team to respond and accompany inspectors during even no-notice inspections and during non-duty hours to mirror the inspectors by duplicating the information they collect. Take pictures of what the inspectors photograph and create a copy of the documents they collect because, oftentimes, regulators will issue enforcement actions but refuse to provide the accompanying evidence which makes it difficult to defend ourselves.
- You may need to verify and vet inspectors to ensure installation security
- Know the areas most likely to produce violations:
 - Hazardous waste management plans
 - Personnel training records
 - Documentation of “cradle-to-grave” management of hazardous waste, to include return manifests showing wastes destined for disposal sites actually arrived
 - Labeling and condition of hazardous waste barrels
 - Contingency plans and emergency procedures
 - Inconsistencies between air and water discharge monitoring reports and actual permit limitations
 - AAFES and Defense Commissary Agency (DECA) facilities
 - Government owned and contractor operated remote sites
 - Privatized housing

Bottom Line

- Preparation is the key to avoiding enforcement actions
- Prompt and cooperative response is the key to resolving enforcement actions
- Consult with the base SJA, CEI, and BE immediately upon receiving an enforcement action and before signing or paying anything

REFERENCES

- AFI 32-7001, *Environmental Management* (23 August 2019), including AFI32-7001_AFGM2020-01, 21 October 2020
- AFI 51-301, *Civil Litigation* (2 October 2018)
- AFI 65-605 Volume 1, *Budget Guidance and Procedures* (16 August 2012), incorporating Change 1, 29 July 2015, including AFMAN65-605, Volume 1_AFGM2020-01
- AFMAN 32-7002, *Environmental Compliance and Pollution Prevention* (4 February 2020)

MEDIA RELATIONS AND ENVIRONMENTAL CONCERNS

The Air Force and Space Force develops public engagement programs to build sustained public understanding, trust, and support for Air Force and Space Force missions and people. Public Affairs (PA) activities are to inform and include audiences during critical decision-making windows, and to communicate the Air Force and Space Force's commitment to environmental excellence. Major areas of PA involvement are discussed below.

Environmental Impact Analysis Process (EIAP) PA Responsibilities

- Ensure all PA aspects of EIAP actions are conducted in accordance with 32 C.F.R. § 989 and AFI 35-101, *Public Affairs Operations*, Chapter 6
- Review and clear environmental documents in accordance with AFI 35-101 prior to public release
- Assist Air Force and Space Force judge advocates in planning and conducting public meetings and hearings
- Advise the Environmental Planning Function (EPF) and the action proponent on PA activities on proposed actions and reviewing environmental documents for public involvement issues
- Advise the EPF of issues and competing general public and stakeholder interests that should be addressed in the EIS or EA
- Attend and assist in preparation of and attending scoping and other public meetings or media sessions on environmental issues
- Prepare, coordinate, and distribute timely news releases and other public information materials related to and aligned with the proposal and associated EIAP documents
- Notify the media (television, radio, newspaper) of actions as necessary under 32 C.F.R. § 989.24 and purchase advertisements when newspapers will not run notices free of charge. The project proponent will fund the required advertisements.
- Determine and ensure Security and Policy Review requirements are met for all information proposed for public release as guided by Chapter 9 of AFI 35-101

Installation Restoration Program (IRP) PA Responsibilities

- Serve as the focal point for PA aspects of proposed IRP actions as noted in paragraph 6.2.3.9 of AFI 35-101
- Advise on and support the PA aspects of the base's development and participation in the Restoration Advisory Board, a community based advisory board, plus other public information activities
- Ensure all concerned stakeholders, community groups and governmental entities are in the communication channel
- Prepare an IRP community relations plan and announce the availability and location of information repositories (often called the Administrative Record)

Air Installation Compatible Use Zone (AICUZ) Program PA Involvement

- Base Community Planner (BCP) generally manages the AICUZ program. PA assists the BCP to prepare for public meetings and releases and distributes relevant information.
- PA will handle noise complaints directly and provide timely, responsive, and factual answers to maintain good media and community relations. PA also presents these complaints to appropriate installation meetings or boards. PA will refer all claims for damages to the base legal office.

REFERENCES

32 C.F.R. Part 989 (2011)

AFI 35-101, *Public Affairs Responsibilities and Management* (20 November 2020)

AFMAN 35-101, *Public Affairs Procedures*, 7 December 2020

MISSION SUSTAINMENT

Mission sustainment hazards (e.g., encroachment) have the potential to directly affect both the ability of Air Force and Space Force installations to accomplish the mission and the quality of life in surrounding communities. The primary regulation, AFI 90-2001, *Mission Sustainment*, was significantly revised in July 2019, both substantively and administratively, from the original 3 September 2014 Encroachment Management Program publication. AFI 90-2001 establishes a risk reporting framework for cross-functional teams at the installation, Major Command (MAJCOM), and Headquarters Air Force and Space Force level. The recommended team composition now requires direct involvement from operational staff to ensure that mission-related hazards are accounted for and proactively addressed. It also introduces a shareable hazard and control reporting process (Mission Sustainment Risk Report) that consolidates existing encroachment information (e.g., Installation Complex Encroachment Management Action Plans (ICEMAP)) with new risk analyses. Some key terms are modified to emphasize mission relevance. For example, “encroachment management” has been replaced with “mission sustainment,” “encroachment challenges” are now termed “mission sustainment hazards,” and “management actions” are “controls.” This updated policy also aligns mission sustainment with the Air Force risk management model described in AFI 90-802, *Risk Management*, and Air Force Pamphlet 90-803, *Risk Management Guidelines and Tools*. The Air Force Mission Sustainment Risk Management Process addresses common issues impacting installations; the program integrates existing foundational programs such as noise regulation and the Air Installation Compatible Use Zone (AICUZ) Program. The Risk Management Process also provides guidelines for managing and reporting hazards that pose both current and future risks to Air Force and Space Force mission operations.

Installation Mission Sustainment Team (IMST)

- The installation commander establishes an IMST to assist in implementing the Mission Sustainment Program at an installation
- The team will be a cross-functional team with representatives from various organizations
- Goal of the IMST:
 - Address mission sustainment across the Installation Complex/Mission Footprint (IC/MF)
 - Brief the installation commander and MAJCOM MST at least annually, on emerging threats, the status of the program, including information on emerging hazards, the status of control implementation, and recommended focus areas for the coming year
- Installation Complex Encroachment Management Action Plan (ICEMAP): Three volume document (Action Plan, Reference Book, and Community Brochure) which addresses current and future encroachment and sustainment challenges facing Air Force and Space Force installations and their surrounding communities

Federal Noise Control Act (FNCA)

- The FNCA exempts aircraft, military weapons, and equipment designed for combat use from noise regulation under the Act
- Although the FNCA generally subjects government agencies to state and local noise control regulation, courts have determined state and local regulation of aircraft noise is preempted by FAA regulation
- The FNCA requires the Air Force and Space Force to comply with state and local noise stationary source regulations to the same extent as any other person

Air Installation Compatible Use Zone (AICUZ) Program

- Local governments ordinarily establish land use regulations. The Air Force and Space Force supports and encourages local zoning and other land use controls that ensure land areas surrounding bases, especially private lands adjacent to runways, remain compatible with continued Air Force and Space Force operations.
- The Department of Defense (DoD) has established the AICUZ program to assist local governments in establishing suitable land use regulations in the vicinity of bases
- The Air Force and Space Force develops and provides local land use planning authorities recommendations designed to ensure continued compatibility between installations and neighboring civilian communities
 - The first step in preparing an AICUZ proposal is to identify areas with high accident potential or affected by high noise levels from military aircraft operations
 - The Air Force and Space Force uses this information to assess compatibility of land uses with current and projected Air Force and Space Force operations and to make recommendations to the local zoning authority
 - The Air Force and Space Force have no authority to implement the land use recommendations set forth in the AICUZ study or to control or regulate off-base land use. It simply presents the proposal to the local zoning authority which may approve or reject the proposal.
 - Close coordination between the commander, the base comprehensive planner, and local zoning officials is essential. This coordination serves to educate local land use planners regarding noise and safety impacts on private lands.
 - Congress has provided authority to acquire property interests, including restrictive use or conservation easements where necessary to sustain the mission and prevent encroachment (10 U.S.C. § 2684a)
 - Air Force and Space Force representatives may not threaten the local community with reprisals if the Air Force and Space Force proposal is not accepted. Air Force and Space Force representatives may not appear to coerce or otherwise unduly influence local zoning officials. For example, reprisal or coercion could include linking acceptance of a proposal to potential Base Realignment and Closure (BRAC) decisions.
 - Constant consultation with the base staff judge advocate (SJA) will minimize potential for lawsuits and impacts on the mission

REFERENCES

Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918

Agreements to Limit Encroachments and Other Constraints on Military Training, Testing, and Operations, 10 U.S.C. § 2684a

DoDI 4165.57, *Air Installations Compatible Use Zones (AICUZ)* (2 May 2011), incorporating Change 3, 31 August 2018

AFI 32-1015, *Integrated Installation Planning* (30 July 2019), incorporating Change 1, 13 October 2020, with corrective actions applied 4 January 2021

AFI 90-2001, *Mission Sustainment* (31 July 2019)

AFI 90-802, *Risk Management* (1 April 2019)

Air Force Handbook 32-7084, *AICUZ Program Manager's Guide* (2 November 2017)

Air Force Pamphlet 90-803, *Risk Management Guidelines and Tools* (11 February 2013), certified current 21 December 2020

CONTROL OF TOXIC SUBSTANCES

The Toxic Substances Control Act (TSCA) (15 U.S.C. §§ 2601-2692) regulates the manufacture, processing, and distribution of chemicals that pose unreasonable risk of injury to human health or the environment. TSCA authorizes the Environmental Protection Agency (EPA) to screen existing and new chemicals to identify potentially dangerous products or uses and to take action ranging from banning production, import, and use to requiring warning labels. The Frank R. Lautenberg Chemical Safety for the 21st Century Act provided EPA significant authority enhancements in 2016 to evaluate current and new chemical uses. The amendments have the potential to impact Air Force and Space Force operations, in particular, Air Force air frame maintenance as EPA is in the process of evaluating several solvents in use in the Air Force and Space Force inventory.

Polychlorinated Biphenyls (PCBs)

- TSCA prohibits manufacture and distribution of polychlorinated biphenyls (PCBs)
 - PCBs were common components in hydraulic fluids, lubricants, insecticides, and heat transfer fluids and were used in electrical equipment (e.g., transformers, capacitors)
 - Old transformers and capacitors containing PCBs may be found on installations, as might PCB-contaminated soil
 - Past insecticide spraying, ceiling tile coatings, and certain painted surfaces may also be sources of PCBs
 - Installation personnel should be trained to avoid mixing normal used oil and oil containing PCBs. Managing PCB imbued oil under TSCA is far more expensive than managing used oil under RCRA.

Asbestos

- TSCA also regulates asbestos
 - Asbestos was widely used in thousands of products because it is strong, flexible, will not burn, insulates effectively, and resists corrosion (e.g., floor tiles, insulation, or sealants)
 - Inhalation or ingestion of asbestos fibers can cause disabling or fatal diseases
 - Regulatory requirements cover, among many things, remediation of asbestos hazards, implementation of proper work practices, and training in proper handling
 - Installations are most likely to encounter asbestos when maintaining, repairing, renovating, or demolishing buildings or utilities
 - Asbestos is also regulated by other statutes, including the Clean Air Act and the Occupational Safety and Health Act which specify work practices for asbestos to be followed during demolitions and renovations of all structures, installations, and buildings

Radon

- TSCA requires studies of federal buildings to determine the extent of indoor radon contamination, but does not require monitoring or abatement of radon
- Radon is a naturally-occurring radioactive gas that may be found in drinking water and indoor air, and which presents serious health risks, including cancer
- Radon in soil under homes is the biggest source of radon in indoor air

Lead-Based Paint

- TSCA addresses lead hazards, including requirements for the identification, reduction, disclosure, and management of lead-based paint
 - Lead exposure can cause serious health effects, particularly in children
 - Lead, especially lead-based paint (LBP), is a major concern on installations where it was commonly used on military family housing and other buildings prior to 1950
 - Bases must address lead hazards during maintenance, repair, renovation, and demolition of buildings
 - TSCA seeks to reduce the lead hazard to young children by focusing on child-occupied facilities and “target housing” (housing built before 1978)
 - Although TSCA does not contain a general waiver of sovereign immunity, the waiver for LBP is extensive, requiring DoD to comply with federal, state, and local requirements
 - DoD policy requires military installations to comply with disclosure regulations related to LBP in military family housing
- TSCA also authorizes established state programs (e.g., California) to establish LBP standards for the reduction of lead in buildings not otherwise covered by the child-occupied target buildings referenced above. Check with your SJA to determine if an applicable state program is in effect that could potentially impact the installation.

REFERENCES

40 CFR Part 61, Subpart M (1990)

Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692

Clean Air Act, 42 U.S.C. § 7401

Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678

AFI 90-801, *Environment, Safety, and Occupational Health Councils* (9 January 2020)

AFMAN32-7002, *Environmental Compliance and Pollution Prevention* (4 February 2020)

UTILITY LAW

Utility costs are often a large part of the operating cost of federal facilities. The Air Force and Space Force have established the Utility Law Field Support Center (ULFSC), embedded within the Air Force Civil Engineer Center Energy Directorate (AFCEC/CN), at Tyndall Air Force Base, Florida, to assist continental United States (CONUS) commanders in minimizing utility costs. The ULFSC assists installations by supporting contracting actions with utility providers, by representing Air Force and Space Force interests in utility rate litigation, and by advising on energy resilience projects. The ULFSC provides legal advice and counsel to all levels of command, from the base legal office to Air Force Headquarters.

Methods of Purchasing Utilities

- General Services Administration (GSA) administers area wide contracts for energy acquisition
 - Area wide contracts are convenient and are modifiable to address specific base issues
 - GSA area wide contracts are found at <http://www.gsa.gov/portal/content/184627>
- Federal Acquisition Regulation (FAR) Part 41 individual installation contracts are the most common utility purchase method
- Base legal offices are responsible for reviewing utility services solicitations and proposed contracts to determine if they are legally sufficient. The ULFSC is available as reach-back support for all utility contract questions.
- Base legal offices ensure utility service contracts comply with Federal, state, and local laws, including ordinances, commission rulings, court decisions, and opinions of the Comptroller General

Utility Litigation Challenging Rate Increases

- The ULFSC represents Air Force and Space Force interests in utility rate cases
- Utility rate cases are triggered by utility companies filing with a request for change in rates
- The Base Civil Engineer (BCE) should give all known details regarding an actual or potential case to the base legal office, base contracting, and AFCEC Energy Directorate Rates and Renewables (AFCEC/CNR) within 24 hours of change notification, which usually comes from the utility company as part of a notice with the monthly bill
- Within one week of the date that the installation informs AFCEC/CNR of a proposed rate increase, the BCE should provide AFCEC/CNR, base contracting, and the ULFSC via the base legal office all required information related to the request

Energy Resilience Projects

- Installation energy resilience goals can be met through various vehicles
 - An Energy Savings Performance Contract (ESPC) is a collaboration between a federal agency and a third-party contractor
 - Utility Energy Service Contracts (UESC) are performed by local utility service providers
- Energy generation projects, such as combined heat and power plants and solar arrays, may lower energy costs

- Note: Legal offices are advised to contact the ULFSC when they become aware of any type of utility projects on base, such as installing new generation and privatization of base utilities. Regardless of who owns the project, the installation, a tenant, or other, often these projects can have effects on the installation's utility contracts, the installation's utility bills, and the installation's contractual liability to others.
- Under a power purchase agreement (PPA), an installation leases land to an energy generation developer (local utility company or third-party contractor) and contracts to purchase energy produced by the project
- For cost effectiveness, project energy rates must be less than preexisting rates
- Enhanced Use Leases (EUL) involve a land lease to a developer who builds an energy project on the leased land

Assistance

- Utility acquisition matters can be very complex. Installations should notify AFCEC and the ULFSC of energy rate increases and seek assistance on utility matters.
- The 24-hour AFCEC reach-back support center is available at (850) 283-6995/DSN 523-6995 or <http://www.afcec.af.mil>
- The ULFSC is available at (850) 283-6289/DSN 523-6289 or ulfsc.tyndall@us.af.mil

REFERENCES

Economy Act, 31 U.S.C. §§ 1535-1536

48 C.F.R. Part 41 (2002)

AFMAN 32-1061, *Providing Utilities to U.S. Air Force Installations* (16 July 2019)

AFPAM 32-10144, *Implementing Utilities at U.S. Air Force Installations* (8 March 2016)

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INTRODUCTION TO OPERATIONS LAW

In pursuit of the Department of the Air Force's mission to fly, fight, and win in air, space, and cyberspace, Airmen and Guardians must conduct operations in accordance with the laws of the United States and international law. Respect for the rule of law is a fundamental part of not only who we are as the world's greatest Air Force and Space Force but as a nation. Compliance with the law is a strategic and operational imperative. Failure to comply with the law undermines the legitimacy of U.S. military operations and can result in mission failure. Accordingly, commanders must understand the relationship between adherence to the rule of law and the achievement of operational objectives. The following provides an overview of operations law and the role of judge advocates as operations law advisors. This discussion establishes the foundation for the remaining sections in this chapter.

Operations Law Defined

- Operations law is the domestic, foreign, and international law associated with the planning and execution of military operations in peacetime or hostilities. The term "operations law" is also used to describe the application of law to a specific mission of the supported Department of the Air Force unit. Operations law includes, but is not limited to:
 - The principles of the Law of War (LoW)/Law of Armed Conflicts (LOAC)
 - The Law of Armed Conflicts
 - Rules of engagement (ROE) and Rules for the Use of Force (RUF)
 - The law relating to security assistance
 - Training, mobilization, and pre-deployment preparation
 - Deployment
 - Targeting
 - Overseas procurement
 - The conduct of military combat operations
 - Counter-terrorist activities
 - Status of Forces Agreements (SOFAs)
 - Operations in the information environment
 - Operations against hostile forces
 - Rule of law operations
 - Air and space law
 - International agreements
- Operations law also includes any area of the law that may affect a commander's ability to plan and successfully execute the unit's mission (e.g., environmental law, contract law, fiscal law, and military justice)

Role of Judge Advocates

- The Air Force and Space Force, like other military Services, continue to operate in an increasingly complex environment around the world, demanding nothing less than the very best in legal capability. Judge advocates who advise on operations law matters are mission-focused and provide commanders with legally sustainable options and recommendations to maximize the commander's options and to enable mission accomplishment. Operations law is a mindset as much as an area of practice.
- Legal support to Air Force and Space Force commanders is critical to mission success because proper legal counsel enhances commanders' decision-making ability. Successful commanders are those who demand close coordination with their servicing staff judge advocate (SJA). Judge advocates (JAGs) must be thoroughly integrated into unit planning and the execution of military operations in order to ensure mission accomplishment. For example, Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement (SROE)/ Standing Rules for the Use of Force for U.S. Forces (SRUF)*, specifically directs that JAGs must be involved in the planning of operations.

REFERENCES

- CJCSI 3121.01B, *Standing Rules of Engagement/ Standing Rules for the Use of Force*, 13 June 2005 (certified current 18 June 2008)
- Joint Publication (JP) 3-84, *Legal Support* (2 August 2016)
- Air Force Operations and The Law, 4th Edition (2020)
- AFI 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development* (29 November 2018)

THE LAW OF WAR

It is the Department of Defense (DoD) and Department of the Air Force's policy to comply with the law of war (LoW, also known as the law of armed conflict (LOAC) or international humanitarian law (IHL)) during all armed conflicts, however characterized. In all other military operations, members of the DoD Components will continue to act consistent with the LoW's fundamental principles and rules, including those contained in Common Article 3 of the 1949 Geneva Conventions and the principles of military necessity, humanity, distinction, proportionality, and honor. Department of the Air Force commanders are responsible for ensuring that their respective Airmen and Guardians know the fundamental precepts of the LoW and have knowledge of the law commensurate with their duties and responsibilities. Commanders cannot assume that every Airman and Guardian is fully aware of all his/her rights and responsibilities and duty to enforce the LoW. Now more than ever, in the myriad of operational situations in which the Department of the Air Force units are involved, personnel must be trained in, and comply with, the LoW. Judge advocates are available to assist commanders with this responsibility.

The Law of War

- The LoW is the part of international law that regulates the conduct of hostilities and the protection of war victims in both international and non-international armed conflict, belligerent occupation, and the relationships between belligerent, neutral, and non-belligerent States. This section will not address the portion of the law of war governing the resort to armed force (*jus ad bellum*).
- The LoW has two main sources: (1) treaty law arising from formal written international agreements, which are binding on states that are parties, and (2) customary international law arising from the practice of States followed out of a sense of legal obligation. Customary international law is unwritten and, once formed, is generally binding on all States.
- LoW treaty law is generally divided into two overlapping areas: (1) Geneva Law, named for treaty negotiations held over the years at Geneva, Switzerland, and (2) Hague Law, named for treaty negotiations held at The Hague, Netherlands
 - Geneva Law: Consists of four treaties known as the 1949 Geneva Conventions, which concern the protection of persons involved in conflicts (wounded and sick; wounded, sick, and shipwrecked at sea; prisoners of war (POWs); and civilians)
 - The Geneva Conventions are supplemented by three additional protocols. The United States is not a party to Additional Protocol I (AP I) concerning international armed conflicts or Additional Protocol II (AP II) regarding non-international armed conflicts but it accepts certain aspects of AP I and AP II as reflecting customary international law. Advice should be sought from a judge advocate as to the applicable law.
 - The United States is a party to Additional Protocol III (AP III), which recognizes a red crystal as an additional distinctive protective emblem
 - Hague Law: Concerned mainly with the means and methods of warfare (e.g., lawful and unlawful weapons, targeting)
 - The Hague Peace Conferences of 1899 and 1907 resulted in bans on certain types of war technology and established a court to settle international disputes
 - Conferences in 1922-1923 to create the Hague Rules of Air Warfare resulted in draft rules that never took effect, but are today viewed as reflecting guidelines for proper conduct

Basic Legal Principles of Law of War

- Military Necessity:

- Military necessity is the principle that justifies the use of all measures not prohibited by the LoW needed to defeat the enemy as quickly and efficiently as possible
- The principle of military necessity permits attacks on military objectives, such as any objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Examples include an adversary's troops, bases, supplies, lines of communications, and headquarters.

- Humanity:

- Humanity forbids the infliction of **unnecessary** suffering, injury, or destruction to defeat the adversary or to accomplish a legitimate military purpose. Once a military purpose is achieved, the infliction of further suffering is unnecessary.
- Humanity is the logical inverse of the principle of military necessity. If certain necessary actions are justified, then certain unnecessary actions are prohibited.

- Distinction:

- Distinction requires parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects
- Military force may be directed only against military objectives, and not against civilians or civilian objects. Civilian objects include places of worship, schools, hospitals, and dwellings. However, these objects can lose protected status in certain circumstances.
- The principle of distinction also prohibits attacks against the following: (1) Combatants hors de combat ("out of the fight"); (2) Civilian objects; and (3) Civilians who are not directly participating in hostilities

- Proportionality:

- Proportionality is the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive
- Commanders who plan military operations must take into consideration the extent of civilian destruction and probable casualties that will result and, to the extent consistent with the necessities of the military situation, seek to avoid or minimize such casualties and destruction
 - The loss of civilian life and damage to civilian property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained
 - This concept does not apply to military objectives, which are legitimate targets anywhere and anytime. However, individual military personnel may be in a protected status (e.g., chaplains, medics, wounded, sick, shipwrecked at sea, surrendering, or aircrews parachuting from disabled aircraft).
- Commanders must take feasible precautions when planning and conducting attacks to reduce the risk of harm to the civilian population and other protected persons and objects
- Feasible precautions are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. For example, if a commander determines that taking a precaution would result in a risk of failing to accomplish the mission or an increased risk of harm to his/her own forces, then the precaution would not be feasible and would not be required.

- Honor:

- Honor (also called chivalry) requires a degree of fairness in offense and defense and a certain mutual respect between opposing military forces. However, honor does allow for lawful ruses, such as camouflage false radio signals and mock troop movements.
- Honor forbids treacherous acts such as perfidy. These acts involve misuse of internationally recognized symbols or status to take unfair advantage of the enemy, such as false surrenders, placing anti-aircraft artillery in hospitals, and misuse of the Red Cross, red crystal, or the Red Crescent.

Conclusion

- Compliance with the LoW is critical to mission success. Proper legal counsel enhances commanders' decision-making ability, aiding in mission success. One key to success for commanders is to ensure judge advocates are thoroughly integrated into unit planning and execution of military operations so that commanders are aware of their options and recommendations to enable mission accomplishment and compliance with the LoW.

REFERENCES

Geneva Convention for the Protection of War Victims, (12 August 1949)

DoDD 2311.01, *DoD Law of War Program* (2 July 2020)

CJCSI 5810.01D, *Implementation of the DoD Law of War Program* (30 April 2010) DoD Law of War Manual (June 2015), updated December 2016

AFI 36-2670, *Total Force Development* (25 June 2020), including AFI36-2670_AFGM2020-03, 7 December 2020

AFI 51-401, *The Law of War* (3 August 2018)

AFPD 51-4, *Operations and International Law* (24 July 2018)

Air Force Operations and the Law, 4th Edition (2020)

RULES OF ENGAGEMENT AND RULES FOR THE USE OF FORCE

This chapter discusses the Rules of Engagement (ROE) and the Rules for the Use of Force (RUF) for Department of Defense (DoD) operations worldwide. The chapter will consider the differences between both sets of rules, their purposes, and when they apply. In operations, there are typically mission-specific ROE and RUF that are built upon the Standing Rules of Engagement (SROE) and Standing Rules for the Use of Force (SRUF). These standing rules are issued by the Secretary of Defense (SecDef) and are contained in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement (SROE)/ Standing Rules for the Use of Force (SRUF) for U.S. Forces*. All commanders should familiarize themselves with CJCSI 3121.01B. While portions of the SROE are classified SECRET and may not be reproduced in this publication, significant portions are unclassified, particularly the self-defense policy and procedures.

Rules of Engagement (ROE)

- *DoD Dictionary of Military and Associated Terms*, and JP 3-84, *Legal Support*, define ROE as “directives issued by competent military authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue combat engagement with other forces encountered”
- ROE govern the use of force in military operations and are premised upon the Law of War (LoW), applicable international and domestic law, government policy, and a host of other political and practical considerations and constraints. ROE are tools for commanders (e.g. the President of the United States/Commander in Chief, SecDef, combatant command commanders) and implemented by those who execute the mission.

Rules for the Use of Force (RUF)

- RUF concern the use of force by U.S. forces **within** U.S. territory or U.S. territorial seas when performing civil support missions and routine antiterrorism and force protection. CJCSI 3121.01B defines RUF as “fundamental policies and procedures governing actions to be taken by U.S. commanders and their forces during all DoD civil support (e.g. military assistance to civil authorities) and routine Military Department Functions including antiterrorism (AT)/force protection (FP) duties, occurring within U.S. territory or U.S. territorial seas.”
- ROE are fundamentally designed to be permissive to allow commanders flexibility to use any lawful weapon or tactic unless specifically restricted whereas RUF are not permissive and require SecDef approval to use any weapons or tactics not already approved within the SRUF

Purposes of ROE

- ROE derive from national policy goals, mission requirements, and the LoW, and serve three functions:
- To provide direction on the use of force from the President, SecDef, and subordinate commanders to units conducting military operations
 - To provide a control mechanism for the transition from peacetime to armed conflict and a return to peacetime
 - To provide a mechanism to facilitate planning
- The three functions all emphasize control, which is necessary for three purposes:
 - Political: To ensure action in the field reflects national policy objectives
 - Military: To ensure the application of force furthers the accomplishment of the mission
 - Legal: To ensure compliance with the law

Standing Rules of Engagement (SROE)

- The current SROE came into force on 13 June 2005 and was certified as current on 18 June 2008. Their purpose is to provide implementation and guidance on two important issues: (1) the inherent right of self-defense and (2) the application of force for mission accomplishment.

SROE Applicability

- SROE apply to:
 - All military operations and contingencies outside U.S. territory and outside U.S. territorial seas.
 - The air and maritime (but not land — see SRUF) homeland defense missions conducted within U.S. territory and territorial seas

Self-Defense in SROE

- Inherent Right of Self-Defense: Unit commanders have an inherent right and obligation to exercise *unit self-defense* in response to a **hostile act** or demonstrated **hostile intent** and. Unless otherwise directed by their commander, individual military members may exercise *individual self-defense*.
- Unit and individual self-defense arises in either of two circumstances:
 - *In response to a hostile act*: A hostile act is an attack or other use of force against the United States, U.S. forces or other designated persons or property. It also includes force used directly to impede the mission and/or duties of U.S. forces (including personnel recovery).
 - *In response to demonstrated hostile intent*: Hostile intent is the threat of *imminent* use of force against the United States, U.S. forces or other designated persons or designated property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces (including personnel recovery). Determining the imminence of a threat will be based on an assessment of all the facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.
- National Self-Defense: The right of a State to defend itself against armed attack is recognized in international law both individually and collectively (i.e. as part of an alliance such as NATO or at the request of another State) and enshrined in Article 51 of the UN Charter
 - National self-defense is the defense of the United States, U.S. forces, and, in certain circumstances, U.S. persons and their property, and/or U.S. commercial assets from a hostile act or demonstration of hostile intent. Unit commanders may exercise National Self-Defense, only when authorized.
- Collective Self-Defense: Is the defense of designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent. Only the President or SecDef may authorize collective self-defense. Typically, the scope of collective self-defense is specified in theater or mission-specific ROE.
- Self-Defense guidance: All necessary means available and all appropriate actions may be used in self-defense. However, four guidelines are included in the unclassified SROE:
 - *De-escalation*: When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions
 - *Necessity*: Exists when a hostile act is committed or hostile intent is demonstrated against U.S. forces or other designated persons or property

- *Proportionality*: The nature, duration, and scope of force used should not exceed what is required to decisively respond to the hostile act or demonstrated hostile intent. This principle of proportionality should not be confused with attempts to minimize collateral damage during offensive operations.
- *Pursuit in Self-Defense*: Self-defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent if those forces continue to commit hostile acts or demonstrate hostile intent

ROE for Mission Accomplishment

- SROE provide direction on the use of force for mission accomplishment. Supplemental measures are produced to provide for mission-specific ROE.
- The SROE are designed to be permissive in nature. Therefore, unless a specific weapon or tactic is restricted, commanders may use any lawful weapon or tactic available for mission accomplishment.
- Declared Hostile Force: SROE permit appropriate U.S. authority to declare any recognized enemy as a declared hostile force. U.S. forces may engage declared hostile forces regardless of whether such forces have committed a hostile act or demonstrated a hostile intent, subject to the LoW and in accordance with prescribed targeting guidance or other ROE provisions.

Critical Factors that Influence the Promulgation of ROE

- National security policy (protect interests of the United States and allies)
- Operational and policy concerns (protect our forces and those of our allies; take steps beyond LoW requirements to address casualties)
- Domestic law and regulations (e.g., Executive Order 11850, *Enunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents*, limiting use of riot control agents)
- International law (LoW, Status of Forces agreements (SOFAs), UN Security Council Resolutions)
 - The LoW is the part of international law that regulates the conduct of armed hostilities. Violations are punishable under the UCMJ.
- ROE must comply with and can **NEVER** authorize an act that is forbidden under the LoW. Essentially, ROE are always at least as restrictive as the LoW. DoD policy is to comply with the LoW during all armed conflicts, however characterized.

Specific Guidance for U.S. Forces Operating With Multinational Forces

- U.S. forces assigned under operational control (OPCON) or tactical control (TACON) of a multinational force (MNF) will follow the ROE of the MNF for mission accomplishment, if authorized by order of SecDef. U.S. forces retain the right of self-defense. Any inconsistencies between the right of self-defense contained in U.S. ROE and the ROE of the MNF will be submitted through the U.S. chain of command for resolution. While a final resolution is pending, U.S. forces will continue to operate under U.S. ROE for self-defense.
- When U.S. forces are under U.S. OPCON or TACON, operating in conjunction with a MNF, reasonable efforts will be made to develop common ROE. If common ROE cannot be developed, U.S. forces will operate under all applicable U.S. ROE and the MNF forces will be informed of this fact.

Considerations When Preparing ROE

- Different ROE must be drafted for different missions (e.g., information operations, counter-drug support operations, noncombatant evacuation operations, domestic support operations, and cyber, maritime, land, air, and space operations). In creating mission-specific ROE, it is important to ask several questions:
 - What is the goal of the President and the SecDef (e.g., hostage rescue, freedom of navigation, destruction of a terrorist training base, humanitarian assistance, etc.)
 - In order to carry out that goal, what is the mission (e.g., conduct a show of force, limited or minor attack, establish a no-fly zone, or occupy hostile territory)
 - Who are the adversary forces, if any, and has there been a hostile force declaration
 - Who are our allies (e.g., NATO, coalition partners, or the United Nations (UN))
 - Are there any unique concerns (e.g., preserving a coalition, avoiding escalation of the conflict, etc.)
 - What specific topics need not be addressed (e.g., strategy, doctrine, restatements of the LoW, tactics, and safety-related restrictions)
 - Who should draft the ROE (e.g., those familiar with the weapons and the systems), keeping in mind that commanders are responsible for the ROE
 - Does the combatant command or joint force command have an ROE working group established
 - How are ROE disseminated (e.g., execute order (EXORD), fragmentary order (FRAGORD), Special Instructions (SPINS), joint task force guidance)

Supplemental Measures and Command Guidance

- Although the SROE are fundamentally permissive, commanders at all echelons may issue or request approval of supplemental ROE. The SROE specify the required approval level for certain types of supplemental measures. Supplemental measures are primarily used to define limits or grant authority for the use of force for mission accomplishment. Clarity is the goal.
- Subordinate commanders may issue tactical directives or other forms of command guidance to clarify the application of the governing ROE or RUF for members of their command. However, if a commander's guidance further restricts approved ROE, that commander is obligated to notify SecDef as soon as practical of any imposed restriction.

Standing Rules for the Use of Force (SRUF)

- In contrast to SROE, the SRUF are not designed to be permissive. As such, specific weapons and tactics not approved within the SRUF require SecDef approval.

SRUF Self-Defense

- Outside of military operations, U.S. forces may use force only in self-defense:
 - Inherent Right of Self-Defense: Unit commanders have an inherent right and obligation to exercise unit self-defense. Unless otherwise directed by their commander, individual military members may exercise individual self-defense.
 - Unit and Individual Self-Defense: Arises in response to hostile acts or demonstrated hostile intent, and are treated the same in the SRUF as in the SROE

Mission Specific RUF

- Commanders may submit requests to the SecDef for mission-specific RUF if required. Such mission-specific RUF may be requested for tasks that, due to their distinctive nature, require the use of different weapons or tactics not permitted by the SRUF.
- Such mission-specific RUF may also be tailored to meet the challenges presented by developing threats (e.g., active shooters on installations) or developing technology (e.g., remotely piloted aircraft) by altering the weapons or tactics available for employment

REFERENCES

Charter of the United Nations, Art. 51 (26 June 1945)

Executive Order 11850, *Enunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents* (8 April 1975)

DoDD 2311.01, *DoD Law of War Program* (2 July 2020)

DoD Law of War Manual (June 2015), updated December 2016

CJCSI 3121.01B, *Standing Rules of Engagement for U.S. Forces* (13 June 2005), certified current 18 June 2008

CJCSI 3160.01C, *No-Strike and the Collateral Damage Estimation Methodology* (9 April 2018)

CJCSI 3370.01C, *Target Development Standards* (14 August 2018)

CJCSI 5810.01D, *Implementation of the DoD Law of War Program* (30 April 2010)

DoD Dictionary of Military and Associated Terms (January 2021)

JP 3-84, *Legal Support* (2 August 2016)

INTERNATIONAL HUMAN RIGHTS LAW

International Human Rights Law (IHRL) is the body of law focusing on the protection of life and dignity of human beings. In contrast to most areas of international law, IHRL is concerned with the rights of individuals rather than the rights of sovereign states. It imposes obligations upon states to protect fundamental aspects impacting the life and dignity of individuals. It is the policy and practice of the United States Government to respect and implement its obligations under the international human rights treaties to which it is a party. It is also U.S. policy that the prevention of mass atrocities and genocide is a core national security interest and core moral responsibility.

Law of War (or Law of Armed Conflict) and International Human Rights Law (IHRL)

- The U.S. position is that the Law of War (LoW) and IHRL are separate bodies of law. However, to the degree that both can be applied without conflict, the protections of both the LoW and IHRL should be applied during military operations (in peacetime and in conflict).
- In military operations where provisions of the LoW and IHRL seem to conflict, it is the Department of Defense (DoD)'s position that the provisions of the LoW will prevail over IHRL, including the conduct of hostilities and the protection of persons involved in armed conflict. Advice should be sought from judge advocates about the applicable law.
- Commanders should be aware that some coalition partners may be subject to different IHRL obligations. Coalition partners may be subject to different treaty obligations and may have different interpretations of the law and the scope of its application in military operations.
 - The European Court of Human Rights has, for example, ruled that aspects of the European Convention on Human Rights apply to a party's military forces serving abroad and during armed conflict
 - The European Court of Human Rights in Strasbourg, in the case of *Al-Skeini v. United Kingdom*, found that the United Kingdom's human rights obligations apply to its acts in Iraq, and that the United Kingdom had violated the European Convention on Human Rights in the failure to adequately investigate the killings of five Iraqis by its forces there

IHRL Obligations

- The LoW directly incorporates many core human rights protections
- DoDD 2311.01, *DoD Law of War Program*, dictates that members of the DoD Components shall comply with the LoW during all armed conflicts, however characterized
 - The U.S. acknowledges Article 75 of Additional Protocol I to the 1949 Geneva Conventions as reflective of U.S. policy and practice. This article applies to persons who fall under the power of the U.S. during international armed conflict, and, at a minimum (unless other LoW provisions offer greater protection), provides certain protections without adverse distinction based on race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or other similar criteria. In particular, Article 75:
 - Prohibits violence to their life, health, or physical or mental well-being (in particular, murder, torture of all kinds (whether physical or mental), corporal punishment, and mutilation)
 - Prohibits outrages upon personal dignity (in particular, humiliating and degrading treatment, enforced prostitution, and any form of indecent assault), the taking of hostages, collective punishments, and threats to commit any of the above acts

- Guarantees that those arrested, detained, or interned for actions related to the conflict will be informed of the reason for the actions taken
- Guarantees provisions for fundamental fairness at any court, hearing, or tribunal
- Provides that detained women will be held separate from detained men (other than family members), and will be directly supervised by women
- Common Article 3 of the 1949 Geneva Conventions applies to non-international armed conflicts. It provides similar protections for civilians and those persons no longer taking part in the conflict.
- IHRL obligations may arise out of U.S. treaty law or customary international law. While there is no definitive list of these provisions, the following acts are prohibited:
 - Genocide
 - Slavery
 - Murder or forced disappearance
 - Torture or other cruel, inhuman, or degrading treatment or punishment
 - Prolonged arbitrary detention
 - Systemic racial discrimination
 - Hostage taking
 - Punishment without fair trial

Obligations to Prevent or Punish Human Rights Violations

- Commanders have a legal obligation to ensure that forces under their command do not commit human rights violations. Such violations may be punishable under the UCMJ, the War Crimes Act, or under other federal law.
- U.S. forces should recognize that human rights violations may occur in an area of military operations resulting from adversaries, partner states, or other parties' conduct or actions. If U.S. forces become aware of human rights violations committed by U.S. forces, enemy forces, or other parties, the unit commander must immediately report reportable incidents (as defined by DoDD 2311.01), by operational incident reporting procedures or other expeditious means, through the chain of command to the Combatant Commander.
- Prior to any forceful intervention to stop IHRL violations, U.S. forces must ensure that their actions are consistent with the rules of engagement (ROE) or rules for the use of force (RUF) for the operation
 - Under the Standing Rules of Engagement (SROE), collective self-defense of non-DoD persons or the affirmative defense of others would not be authorized unless for the protection of previously designated persons or groups. Commanders should seek prior authorization before acting.
 - Under the Standing Rules for the Use of Force (SRUF), the use of deadly force would be authorized when reasonably necessary to prevent an imminent threat of life or serious bodily harm to civilians directly related to the assigned mission. However, the scope of application of the SRUF is narrow.

REFERENCES

War Crimes Act of 1996, 18 U.S.C. § 2441

Executive Order 13107, *Implementation of Human Rights Treaties* (10 December 1998)

Presidential Study Directive (PSD)-10, *Presidential Study Directive on Mass Atrocities* (4 August 2011)

DoDD 2311.01, *DoD Law of War Program* (2 July 2020)

DoD Law of War Manual (June 2015), updated December 2016

CJCSI 3121.01B, *Standing Rules of Engagement for U.S. Forces* (13 June 2005), certified current
18 June 2008

Al-Skeini v. United Kingdom, 53 Eur. H.R. Rep. 589 (2011)

INTERNATIONAL LAW AND INTERNATIONAL AGREEMENTS

International law consists of rules and principles regulating the conduct of nations (often referred to as “states”) and international organizations in their relations with individuals, other international organizations, or other states. International law is not just applied by international tribunals and domestic courts, but it is also applied in many contexts beyond judicial proceedings. To the extent that an international norm is perceived as “law” by the international community, that perception often imposes restraints on the behavior of states and affects their decision-making process. States rely on it in their diplomatic relations, negotiations, and policy-making, and often defend the actions and challenge the conduct of other states by invoking its authority. Commanders should be familiar with international law concepts since these types of issues most commonly impact mission success.

Two Main Sources of International Law: International Agreements and Customary Law

- International Agreements: A broad category of mostly written, but sometimes oral, agreements entered into by authorized representatives of the parties to the agreement, with each party being either a state or a recognized international organization. In very limited and specific circumstances, Air Force and Space Force commanders may have authority to negotiate and conclude international agreements in accordance with Department of State (DoS), Department of Defense (DoD), and Department of the Air Force policy and guidance.
 - The parties enter into commitments involving the subject matter of the agreement and agree that international law will govern its terms with the force of law
 - International law does not distinguish between treaties and binding international agreements
 - Any treaty or agreement is binding only on the parties who have agreed to be bound by it
 - Bilateral agreements involve two parties, while multilateral agreements involve more than two parties
 - Binding international agreements may be called by many names, to include treaty, convention, covenant, pact, protocol, status of forces agreement (SOFA), executive agreement, memorandum of understanding (MOU), memorandum of agreement (MOA), etc. Whatever their designations, all binding agreements have the same status under international law.
 - An international agreement to which the United States is a party are part of U.S. law and equivalent in authority to a federal statute if its provisions are deemed self-executing or have been implemented by other federal legislation
- Customary International Law: International law resulting from the general and consistent practice of states which they follow due to a sense of legal obligation. By inference, customary international law does not include practices that states generally follow but can legally disregard. In determining whether a practice or custom is customary international law, positive evidence must show (1) widespread and consistent practice among states over time and (2) that they do so out of a sense of obligation (also known as *opinio juris*).
 - Customary international law is also called international custom and customary law. The U.S. Supreme Court has long held that customary international law is part of U.S. law, so long as it does not conflict with treaty or controlling executive or legislative act or judicial decision.
 - Customary international law may take centuries to evolve, or it may be formed very quickly. Examples include:

- *Outer Space Overflight*: Prior to the 1957 Sputnik flight, states had to seek consent before overflying the territory of other states. No state objected to Sputnik's historic space overflight, which evolved into the customary law that a state's space vehicles may pass over the territory of other states while in outer space without seeking prior consent. This custom was ultimately incorporated into the 1967 Outer Space Treaty.
- *Law of Aerial Warfare*: Practices between warring states on land over years evolved into customary principles of the law of war (e.g., necessity, distinction, and proportionality). States applied the principles to aerial warfare, creating customary rules relating to interception, diversion, search, and capture of enemy and neutral aircraft during armed conflict.
- *Law of the Sea*: Although the U.S. is not a party to the UN Convention on the Law of the Sea, it considers the Convention's provisions on freedom of navigation and overflight as reflecting customary international law and binding upon all nations

International Agreements in the Department of the Air Force

- AFI 51-403, *International Agreements*, regulates this area for all Department of the Air Force (DAF) personnel, consistent with the obligations set forth in DoDI 5530.03, *International Agreements*
- Air Force and Space Force personnel seeking to negotiate and conclude international agreements must first secure approval from the appropriate authority, typically either the MAJCOM/Field Command commander or the Secretary of the Air Force (SecAF) or higher authority
 - Authorized personnel may only negotiate and conclude international agreements on predominantly Department of the Air Force matters within their authority and responsibility
 - Until such delegation has occurred in writing, commanders should take great care that their words or conduct do not lead their foreign counterparts to believe that they are authorized to engage in negotiations or to enter into a binding agreement
- This can occasionally be challenging, as the definition of an international agreement is fairly broad. Under DoDI 5530.03, an international agreement is any agreement concluded with one or more foreign governments, including their agencies, instrumentalities, or political subdivisions, or with an international organization, that:
 - Is signed or agreed to by personnel of any DoD Component, or by representatives of the Department of State, or from other department or agency of the U.S. Government
 - Signifies the intention of the parties to be bound in international law
 - The intent of the parties to have their undertaking governed by international law need not be manifested by a third-party dispute settlement mechanism or any express reference to international law
 - A DoD Component's General Counsel (GC) or staff judge advocate (SJA) must be consulted when making a determination as to whether an international agreement or arrangement is binding under international law
 - Is denominated as an international agreement or as a memorandum of understanding, memorandum of agreement, memorandum of arrangement, exchange of notes, exchange of letters, technical arrangement, protocol, note verbale, aide-mémoire, agreed minute, arrangement, statement of intent, letter of intent, statement of understanding, or any other name connoting a similar legal consequence. This agreement includes any implementing agreement or arrangement, annex, project agreement or arrangement, or other subsidiary arrangement to a master agreement or arrangement.

- Any oral agreement that meets the criteria of this definition is an international agreement. The DoD representative who enters into an oral agreement will cause such agreement to be reduced to writing. In written form, the agreement is subject to the requirements of DoDI 5530.03.
- DoDI 5530.03's definition of "negotiation" is similarly broad. Negotiations are "communication by any means of a position or offer, on behalf of the U.S., DoD, or any officer or organizational element thereof, to an agent or representative of a foreign government, including an agency, instrumentality, or political subdivision thereof, or of an international organization, in such detail that acceptance in substance of such position or offer would result in an international agreement."
- The term includes any such communication, even though the agreement may be conditioned on later approval by the responsible authority
- The term also include the presentation of a draft agreement or other document, the acceptance of which would constitute an agreement, as well as discussions concerning any U.S. or foreign government or international organization draft document whether or not titled "agreement"
- The term does not include preliminary or exploratory discussions, consultations, or routine meetings where no proposed texts or draft documents are presented, so long as such discussions or meetings are conducted with the understanding that the views communicated do not and will not bind or commit any side, legally or otherwise
- All international agreements must be promptly reported to the State Department and/or other relevant organizations (e.g., DoD/GC, Office of the Under Secretary of Defense for Policy (OSD(P)), the Secretary of the Air Force's GC (SAF/GCI), Department of the Air Force – Operations and International Law Directorate (AF/JAO), Defense Intelligence Agency (DIA), or National Security Agency (NSA) for intelligence related agreements), as described in AFI 51-403

Bottom Line

- Commanders should not do anything that might be construed as a negotiation unless they have received advance authority, preferably in writing. Commanders do not have any independent or inherent power to negotiate international agreements. Any power to do so arises from a delegation of the President's executive power.
- DoDI 5530.03 and AFI 51-403 prohibit DoD personnel from making any unilateral commitment to any foreign government or international organization (either orally or in writing), tendering to a prospective party thereto any draft of a proposed international agreement, or initialing or signing an international agreement before obtaining legal concurrence and the required approval to proceed

REFERENCES

Case-Zablocki Act of 1972, 1 U.S.C. § 112b

The Paquete Habana, 175 U.S. 677 (1900)

22 C.F.R. Part 181, *Coordination, Reporting and Publication of International Agreements*

Restatement of the Law, Third, Foreign Relations Law of the United States (1987)

DoDI 5530.03, *International Agreements* (4 December 2019)

AFI 51-403, *International Agreements* (8 February 2019)

AFPD 51-4, *Operations and International Law* (24 July 2018)

Air Force Operations and the Law, 4th Ed. (2020)

DEPLOYED FISCAL LAW

In an era marked by a rapidly expanding operational tempo, commanders must be aware of the rules regarding the spending of appropriated funds in their area of operations (AOO). Fiscal law is often a complex area of law to navigate and can be challenging in a contingency environment. One of the basic tenets of fiscal law is that there must be a specific authority to spend funds BEFORE any funds can be obligated. In a deployed environment, the basic rules of fiscal law still apply. Since statutory authority, threshold amounts, and funding levels can fluctuate from year to year, commanders should consult with financial management and legal personnel on fiscal law issues.

Overseas Contingency Operations (OCO) Funds

- Congress appropriates funds for the Department of Defense (DoD) specifically for designated ongoing contingency operations. From 2001 until 2010, these appropriations were commonly called Global War on Terrorism (GWOT) funds.
- Overseas Contingency Operations (OCO) is a special type of funding requested by the DoD and provided by Congress specifically for OCO. They could be Operation and Maintenance (O&M) or another type of appropriation. OCO funds are to be used only for incremental expenses incurred in direct support of a specific contingency operation and not for day-to-day “normal” operations.

Military Construction Funding Sources

- In addition to the two primary construction authorities, specified and unspecified Military Construction (MILCON), there are other important authorities impacting construction projects in the deployed environment
 - Emergency Construction (10 U.S.C. § 2803): Unobligated MILCON funds for projects not otherwise authorized. These are for projects that are vital to national security or to the protection of health, safety, or the environment, and are so urgent that they cannot wait until the next MILCON authorization act.
 - Contingency Construction (10 U.S.C. § 2804): The Secretary of Defense (SecDef) may authorize MILCON when waiting for the next MILCON authorization act would be “inconsistent with national security or national interest.” The expenditure must be within the amount appropriated for such purpose, and is normally used on extraordinary projects that develop unexpectedly. In addition, these funds may not be used for projects denied authorization in previous Military Construction Appropriations Acts.

Funds for Emergencies, Extraordinary Expenses, and Combatant Commander (CCDR) Support

- Emergency and Extraordinary Expenses (10 U.S.C. § 127): Funding provided to the Secretaries of the military departments for unanticipated emergencies or extraordinary expenses, including unanticipated, short-notice construction. These funds are controlled by the Office of the Administrative Assistant to the Secretary of the Air Force (SecAF) (SAF/AA).
- Official Representation Funds (ORF): A subset of 10 U.S.C. § 127 funds, commonly known as official representation funds (ORFs), may be used to extend official courtesies, on a modest basis, to authorized guests as outlined in AFI 65-603, *Emergency and Extraordinary Expense Authority*. These courtesies include hosting meals, providing entertainment to maintain civic and community relationships, and to purchase appropriate gifts or mementos for presentation to authorized guests.

- Combatant Commander Initiative Funds (CCIF) (10 U.S.C. § 166a): Enables the Chairman of the Joint Chiefs of Staff (CJCS) to act quickly to support the combatant commanders (CCDR) with: (1) force training, (2) contingencies, (3) selected operations, (4) command and control, (5) joint exercises, (6) humanitarian and civic assistance, (7) military education and training to military and related civilian personnel of foreign countries, (8) personnel expenses of defense personnel for bilateral or regional cooperation programs, (9) force protection, and (10) joint warfighting capabilities. Funds are controlled by the CCDR.

Training and Equipping of Foreign Forces

- Funding or equipping foreign forces is not a proper purpose for using O&M funds. Generally, the duties to equip, train, or provide assistance to foreign countries rests with the Department of State (DoS) under Title 22 of the U.S. Code. There are two exceptions to the general rule:
 - Training or instruction for foreign forces for the primary purpose of promoting interoperability, safety, and familiarization training with U.S. forces, with the overall benefit being to U.S. military forces. This is sometimes called “little ‘t’ training.”
 - Specific authorization from Congress for DoD to obligate defense funding to conduct foreign assistance
- Afghanistan Security Forces Fund: Authorizes SecDef to provide certain support to the Afghan security forces, including the provision of equipment, supplies, services, training, facility, and infrastructure repair, renovation, construction, and funding. The Commander, Combined Security Transition Command-Afghanistan (CSTC-A), controls and administers this fund in Afghanistan.
- Section 1206 “Train and Equip” Authority: Provides funds for equipment, supplies, training, defense services, and small-scale military construction activities to build the capacity of foreign military forces and national level security forces. The approval authority is SecDef with the Secretary of State’s concurrence.
- Counter-Islamic State of Iraq and Syria (ISIS) Train and Equip Fund: Provides funds for training, equipment, logistics, supplies, stipends, facility, and infrastructure repair and renovation, and sustainment to military and other security forces of or associated with the Iraqi Government, including Kurdish and tribal security forces or other local security forces for the purpose of defending Iraq, its people, allies, and partner nations from the threat posed by the Islamic State of Iraq and Syria (ISIS) and groups supporting it, and securing the territory of Iraq
- Acquisition and Cross-Servicing Agreements (ACSA): ACSA’s are not funding, but rather bilateral agreements that can be used for reimbursable mutual exchange of Logistic Support, Supplies, and Services (LSSS) with foreign military forces. There are three methods of reimbursement: (1) payment in kind, (2) replacement in kind, and (3) equal value exchange. Commanders must use proper appropriated funds for acquiring LSSS from foreign forces.

Humanitarian Assistance Funding

- Traditionally, humanitarian assistance (HA) is considered foreign assistance within the realm of the DoS. However, recognizing that the need for assistance exists, Congress enacted DoD’s first statutory authority for HA in 10 U.S.C. § 401 in 1986. See also FY21 National Defense Authorization Act (NDAA).

- Overseas Humanitarian, Disaster, and Civic Aid (OHDACA): A series of interrelated statutes, that includes 10 U.S.C. 401 (Humanitarian & Civic Assistance (HCA)), 402 (Relief Supplies Transportation), 404 (Foreign Disaster Assistance), 407 (Humanitarian Demining), 2557 (Excess Non-Lethal Supplies), and 2561 (Humanitarian Assistance). OHDACA's purpose is to support SecDef and CCDRs' security cooperation strategies to build indigenous capabilities and cooperative relationships with allies, friends, civil society, and potential partners.
- Commander's Emergency Response Program (CERP) (FY21 NDAA § 1214): CERP is designed to enable local commanders during contingencies to respond to urgent humanitarian relief and reconstruction by carrying out programs that will immediately assist the indigenous population. CERP is intended to be used for small-scale projects that can be sustained by the local population or government. At the time of this publication, Congress has authorized CERP funds for use in Afghanistan.

Specific Guidance – Area of Operations/Area of Responsibility

- Many contingency environments have theater-specific or local guidance governing the expenditures of funds. Consult the servicing legal office and Comptroller for additional information.

REFERENCES

- Emergency and Extraordinary Expenses, 10 U.S.C. § 127
- Combatant Commander Initiative Funds, 10 U.S.C. § 166a
- Humanitarian and Civic Assistance, 10 U.S.C. § 401
- Humanitarian Relief Supplies Transportation, 10 U.S.C. § 402
- Foreign Disaster Assistance, 10 U.S.C. § 404
- Humanitarian Demining Assistance, 10 U.S.C. § 407
- Authority to Build the Capacity of Foreign Security Forces, 10 U.S.C. § 2282
- Cross-Servicing Agreements, 10 U.S.C. § 2342
- Excess Non-Lethal Supplies, 10 U.S.C. § 2557
- Humanitarian Assistance, 10 U.S.C. § 2561
- Emergency Construction, 10 U.S.C. § 2803
- Contingency Construction, 10 U.S.C. § 2804
- National Defense Authorization Act (NDAA) for Fiscal Years (FY) 2015-2021
- The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984)
- DoDD 2010.09, *Acquisition and Cross-Servicing Agreements* (28 Apr 2003), incorporating Change 2, 31 August 2018
- CJCS Instruction 2120.01D, *Acquisition and Cross-Servicing Agreements* (21 May 2015)
- AFI 65-603, *Emergency and Extraordinary Expense Authority* (29 April 2020)

INTELLIGENCE OVERSIGHT (IO)

Civilian and military officials throughout the U.S. Government rely on timely and accurate information to make decisions and execute governmental functions. Much of the information they rely on is derived from government intelligence activities. Intelligence is defined as both *products* (i.e., products resulting from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations) and the *activities* that result in these products.

U.S. intelligence activities are highly regulated in an effort to balance the need for intelligence with privacy and civil liberty concerns. In particular, there are numerous legal considerations associated with intelligence collection on U.S. persons. Commanders and their intelligence staffs must be fully cognizant of their intelligence oversight (IO) responsibilities.

At various points in our nation's history, Congress has expressed concerns that certain intelligence activities infringed upon the constitutional rights and privacy interests of United States Persons (USPs). As a result, an oversight regime consisting of statutes, executive orders (EOs), and agency regulations was established to ensure the proper use of intelligence capabilities and the proper conduct of intelligence activities. The Department of the Air Force, through the Air Force Intelligence Element and the new Space Force Intelligence Element, possess an array of intelligence and counterintelligence capabilities designed to provide commanders and national leaders with information on foreign nationals, hostile or potentially hostile forces or elements, and areas of actual or potential operations. Intelligence collection is a specialized mission with tactics, techniques, and procedures that require strict control and oversight. The purpose of this chapter is to enable installation-level commanders and their staffs to recognize potential legal issues related to intelligence activities.

Intelligence Oversight (IO) Governance

- IO is defined as the process of independently ensuring all Department of Defense (DoD) intelligence, counterintelligence, and intelligence-related activities are conducted in accordance with applicable U.S. law, executive orders (Eos), Presidential directives, and DoD issuances designed to balance the requirement for acquisition of essential information by the intelligence community (IC), and the protection of constitutional and statutory rights of U.S. persons (USPs). IO also includes the identification, investigation, and reporting of questionable intelligence activities (QIAs) and Significant/Highly Sensitive Matters (S/HSMs) involving intelligence activities.
 - Although the term USP includes U.S. citizens, it is broader. It also includes permanent resident aliens, unincorporated associations substantially composed of U.S. citizens or permanent resident aliens, and corporations incorporated in the United States and not directed and controlled by a foreign government. A person or organization in the United States is presumed to be a USP, unless specific information to the contrary is obtained. A person outside the United States or whose location is unknown is presumed to not be a USP, unless specific information to the contrary is obtained.
 - Per DoDD 5148.13, *Intelligence Oversight*, IO rules apply to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within DoD (referred to collectively in DoDD 5148.13 as the "DoD Components"). The IO rules also apply to anyone acting on behalf of a DoD Component when conducting intelligence or intelligence-related activities. A list of DoD and national intelligence organizations is included in Joint Publication 2-0, *Joint Intelligence*. A definition of "Defense Intelligence Components" is included in DoDD 5143.01, *Under Secretary of*

Defense for Intelligence and Security (USD (I&S)). On 8 January 2021, the United States Space Force became the newest member of the IC.

- The duties and obligations placed on Defense Intelligence Components arise from the U.S. Constitution; Executive Order 12333 (as amended), *United States Intelligence Activities*; DoDD 5240.01, *DoD Intelligence Activities*, DoDD 5148.13, *Intelligence Oversight*; DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities*; and parts of DoD 5240.01-R, Change 2, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons*, and its classified annex. In addition, the Department of the Air Force has its own governing instruction, AFI 14-404, *Intelligence Oversight*. Careful reading of the rules and definitions is critical when operating and advising within this environment.
- Roles and Responsibilities:
 - IO is a shared responsibility between the Airmen or Guardians performing intelligence activities, the commander, the staff judge advocate (SJA), and the inspector general (IG). Airmen and Guardians are the first line of defense and must know the IO standards, comply with them, and report any suspected QIAs or S/HSMs. Commanders should support an active IO program, designate appropriate oversight officials, provide appropriate training, provide reprisal protection for persons reporting QIAs or S/HSMs, and implement corrective action to address substantiated allegations. Guidance and further information are available at the DoD Senior Intelligence Oversight Office (SIOO) website: <http://dodsioo.defense.gov/>.
 - Servicing SJAs provide advice and counsel on proposed and on-going intelligence activities, interpretations of DoDM 5240.01, and assistance to Intelligence Monitors and IGs as each performs their missions. They also support unit training. Legal support should align to the chain of command of the intelligence unit rather than the location of the unit (i.e., regardless of location, intelligence units get IO support through their command organization). Department of the Air Force personnel assigned to non-Department of the Air Force organizations who report QIA or S/HSM to their duty organization are encouraged to also report to Air Force Intelligence Oversight Official or their Air Force Element commander. While the Space Force Intelligence Element stands-up, reporting requirements will be routed to appropriate Air Force Intelligence Oversight Officials. The Secretary of the Air Force (SecAF)'s General Counsel's Office (SAF/GCI) provides policy-significant interpretations of IO guidance.
 - IGs conduct inspections to verify that: (1) Intelligence personnel understand rules and responsibilities; (2) only Air Force or Space Force intelligence elements with assigned intelligence missions are conducting intelligence functions; (3) intelligence activities comply with laws and policies; and (4) reporting procedures are being followed. The IG is also responsible for reviewing every QIA and S/HSM and reporting up to the DoD Senior Intelligence Oversight Office.
- DoD IO regulations and policy are grounded in EO 12333. The term "intelligence activities" refers to all activities that DoD intelligence components are authorized to undertake pursuant to EO 12333. There are only two lawfully assigned intelligence mission sets for the DoD:
 - Foreign intelligence:
 - Title 50, United States Code (U.S.C.), § 3003(2), defines "foreign intelligence" as "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities"

-- Counterintelligence:

- Title 50, U.S.C. § 3003(3), defines “counterintelligence” as “information gathered, and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities”
- DoDD 5240.01 implements EO 12333 and establishes broad responsibilities for officials and offices across the DoD and establishes, as DoD policy, that all DoD intelligence and counterintelligence activities will be carried out pursuant to the authorities and restrictions of the U.S. Constitution, applicable law, EO 12333, and other relevant DoD policies
- DoDM 5240.01 and the remaining parts of DoD 5240.01-R provide the authority by which DoD intelligence components may collect, retain and disseminate United States person information (USPI) and also contain the structure for reporting possible violations. DoDM 5240.01 serves as the regulatory foundation for Service, Combatant Command, and DoD intelligence agency IO programs.

Identifying, Investigating, and Reporting QIAs or S/HSMs

- A questionable intelligence activity (QIA) is any intelligence or intelligence-related activity when there is reason to believe such activity may be unlawful or contrary to an EO, Presidential Directive, Intelligence Community Directive, or applicable DoD policy governing that activity
 - Department of the Air Force units within Defense Intelligence Components must submit a quarterly report of all QIAs through SAF/IG to DoD SIOO, which is presented to the Intelligence Oversight Board
- A Significant or Highly Sensitive Matter (S/HSM) must be reported immediately and is an intelligence or intelligence-related activity (regardless of whether the intelligence or intelligence-related activity is unlawful or contrary to an EO, Presidential Directive, Intelligence Community Directive, or DoD policy), or serious criminal activity by intelligence personnel, that could impugn the reputation or integrity of the Intelligence Community, or otherwise call into question the propriety of intelligence activities. Such matters might involve actual or potential:
 - Congressional inquiries or investigations
 - Adverse media coverage
 - Impact on foreign relations or foreign partners
 - systemic compromise, loss, or unauthorized disclosure of protected information
- Personnel shall report suspected QIAs or S/HSMs to their chain of command immediately
- If not practicable, personnel may report to their unit’s servicing legal office, IG, SAF/GCI, SAF/IG, DoD Office of General Counsel, or DoD Senior Intelligence Oversight Official. Personnel are highly encouraged to additionally report suspected QIAs to their chain of command and Intelligence Oversight Monitors. Generally, IGs investigate QIAs and legal offices advise those conducting the investigation. Specific procedures are found in Section 4 of DoDD 5148.13. Reprisal is prohibited for reporting or even intending to report.

IO Analytical Framework

- Applicability: IO procedures govern the conduct of Defense Intelligence Components and non-intelligence components or elements, or anyone acting on behalf of those components or elements, when conducting intelligence activities under DoD authorities.

- The Air Force Intelligence Component: Members of the Air Force intelligence component include all Air Force intelligence units' personnel **AND** non-intelligence personnel assigned to intelligence functions or activities. This includes regular, reserve, Air National Guard (ANG) personnel in Title 10 or Title 32 status, civilian personnel, and contractors. All members of the intelligence component must comply with the previously identified laws and regulations established for intelligence activities and are subject to IO.
 - Department of the Air Force intelligence units and personnel support strategic, operational, and tactical operations by providing information and services to a diverse set of customers, ranging from national to unit-level decision makers. Every unit with assigned intelligence personnel will have a Senior Intelligence Officer (SIO) who is the responsible authority for intelligence functions and operations within an organization.
- The Space Force Intelligence Element: On 8 January 2021, the designation of the intelligence element of the United States Space Force as the 18th member of the United States Intelligence Community occurred. As the Space Force intelligence element stands-up, all members of the intelligence component must comply with the previously identified laws and regulations established for intelligence activities and are subject to IO.
- Department of the Air Force Units Performing Missions for Intelligence Agencies or Combatant Commands: Those units are also subject to any guidance issued by that agency or command
- Other Air Force Units and Personnel Who Acquire Intelligence: In addition to members of the Air Force and Space Force intelligence components, EO 12333, DoDM 5240.01, and AFI 14-404 apply to non-intelligence units and staffs when assigned an intelligence mission or when performing intelligence work as an additional duty. The SIO will make determinations as to applicability.
- Others: Information collected by non-intelligence personnel and/or equipment for non-intelligence purposes and which is also not considered an intelligence-related activity is not intelligence subject to IO. For example, information Security Forces (SFS) and the Air Force Office of Special Investigations (AFOSI) collect pursuant to their law enforcement missions is not intelligence subject to IO requirements. However, research and development of intelligence capabilities is intelligence-related and subject to the IO rules. Such information must still comply with other applicable laws and regulations.

Threshold Questions:

- *Does the unit have an authorized mission requiring the collection of the information?*
 - It is not enough to be a member of the intelligence component conducting an intelligence activity. An intelligence unit must have an assigned mission necessitating the collection of information.
 - Intelligence activities, whether against a USP or foreign target, are required to be directly related to a unit's assigned mission. For Air Force and Space Force units (not part of a national mission) involved in intelligence collection, this means the collection must relate to defense-related foreign intelligence or counterintelligence. This generally means "information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations." In some very limited circumstances, this will include domestic collection.
 - For example, AFOSI has the authorized standing mission to perform counterintelligence. As such, it may collect intelligence information on a USP under the procedures of DoDM 5240.01 for that purpose.

- ***What authorities allow the collection of information under an authorized mission?***
 - Even if an intelligence unit has the mission to collect the information, it must also have specific legal authorization to collect the information.
 - Intelligence collection is “authorities-driven,” meaning that, unlike many military functions that are included under a commander’s inherent authority, a commander must have specific authority to perform an intelligence mission. Such authority may exist in orders, directives, publications, or other documentation of delegated authority from one vested with authority under EO 12333.
 - Intelligence collection in the course of military operations is typically authorized by the Execution Order (EXORD) directing that mission. The assigned commander may use any intelligence assets under his/her command in furtherance of the assigned mission contained in the EXORD, unless its use is prohibited by higher headquarters or elsewhere in law. Additionally, oversight procedures in DoDM 5240.01 concerning USPs must still be complied with.
- ***What information is being collected?***
 - If the unit has a valid mission and there is specific authority to collect information, the next question is whether USPI has been collected as that term is defined by DoDM 5240.01
 - Under DoDM 5240.01, information is collected “when it is received by a Defense Intelligence Component, whether or not it is retained by the Component for intelligence or other purposes. Collected information includes information obtained or acquired by any means, including information that is volunteered to the Component.”
 - Collected information does not include:
 - Information that only momentarily passes through a computer system of the Component.
 - Information on the internet or in an electronic forum or repository outside the Component that is simply viewed or accessed by a Component employee but is not copied, saved, supplemented, or used in some manner
 - Information disseminated by other Components or elements of the Intelligence Community
 - Information that is maintained on behalf of another U.S. Government agency and to which the Component does not have access for intelligence purposes
 - Critically, information is only collected (and therefore subject to IO rules) if it is received by a member of the DoD intelligence component. This drives the next question of who is actually seeking the information.
 - Once information has been received by a member of the Defense Intelligence Component, it triggers the procedures of DoDM 5240.01. This represents a change from the old rule that information had to be “accepted” by a member of the component. How and where the USPI is collected will govern how long the information can be retained. The clock is triggered for “unintelligible information” once it is decrypted or understandable.
- ***If the information has been collected, the next question is whether it is USPI?***
 - USPI is information that is reasonably likely to identify one or more specific U.S. persons. USPI may be either a single item of information or information that, when combined with other information, is reasonably likely to identify one or more specific U.S. persons
 - Determining whether information is reasonably likely to identify one or more specific U.S. persons in a particular context may require a case-by-case assessment by a trained intelligence professional. USPI is not limited to any single category of information or technology.

- Depending on the context, examples of USPI may include: names or unique titles, government-associated personal or corporate identification numbers, unique biometric records, financial information, and street address, telephone number, and Internet Protocol address information. USPI does not include:
 - A reference to a product by brand or manufacturer's name or the use of a name in a descriptive sense (e.g., Ford Mustang or Boeing 737)
 - Imagery from overhead reconnaissance or information about conveyances (e.g., vehicles, aircraft, or vessels) without linkage to additional identifying information that ties the information to a specific U.S. person
- If the information collected is USPI, the analysis turns to application of the procedures in DoDM 5240.01 and DoD 5240.01-R governing when and how it can be collected (Procedure 2), how long it can be retained (Procedure 3), where it can be disseminated (Procedure 4), and whether any other detailed rules, prohibitions, or approvals for specialized collection methods and techniques apply (Procedures 5-10).

Additional Restrictions:

- In addition to rules on gathering USPI, DoD 5240.01-R, Change 2, contains rules on contracting by intelligence activities, intelligence support to law enforcement, and human experimentation
- Also, special issues are often connected with intelligence activities. These include using false identities on the Internet, certain uses of publicly available information, and uses of emerging technologies like "Big Data" and unmanned aircraft systems. Because these issues are subject to shifting rules, legal counsel are encouraged to elevate the issues.

IO Takeaways:

- To be successful, IO programs require initial and annual training tailored for units who perform intelligence or intelligence-related activities. This begins with familiarity with not only the authority for that intelligence mission, but also the applicable restrictions in DoDM 5240.01 and DoD 5240.01-R
 - USPI must be properly collected, retained, and disseminated (DoDM 5240.01, Procedures 2-4).
 - Special collection techniques (e.g., electronic surveillance, physical searches, etc.) require approvals (DoDM 5240.01, Procedures 5-10)
 - Air Force intelligence professionals and Space Force intelligence professionals must know their responsibilities for reporting QIAs and S/HSMs
 - MAJCOM, Field Command, NAF, FOA, and DRU SJAs and legal advisors, in coordination with MAJCOM IGs, Commanders, and intelligence oversight program managers, are responsible for providing legal advice in QIAs and S/HSMs pursuant to AFI 14-404, 2.8.1
 - Day to day command and control is essential and IO should be incorporated into planning and execution

REFERENCES

- Combatant Commands: Assigned Forces; Chain of Command, 10 U.S.C. § 162
- Commanders of Combatant Commands: Assignments; Powers and Duties, 10 U.S.C. § 164
- Secretary of the Air Force, 10 U.S.C. § 9013
- National Security Act of 1947, 50 U.S.C. §§ 3001 *et seq.*
- Responsibilities of Secretary of Defense Pertaining to National Intelligence Program, 50 U.S.C. § 3038
- Executive Order 12333, *United States Intelligence Activities* (4 December 1981), as amended by EO 13284 (2003), 13355 (2004) and 13470 (2008)
- DoDD 5143.01, *Under Secretary of Defense for Intelligence (USD(I))* (24 October 2014), incorporating Change 2, 6 April 2020
- DoDD 5148.11, *Assistant to the Secretary of Defense for Intelligence Oversight (ATSD(IO))* (24 April 2013)
- DoDD 5148.13, *Intelligence Oversight* (26 April 2017)
- DoDD 5200.27, *Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense* (7 January 1980)
- DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons* (December 1982), incorporating Change 2, 26 April 2017
- DoDD 5240.01, *DoD Intelligence Activities* (27 August 2007), incorporating Change 3, 9 November 2020
- DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016)
- Joint Publication 2-0, *Joint Intelligence* (22 October 2013)
- AFI 14-404, *Intelligence Oversight* (3 September 2019)
- AFI 14-1020, *Intelligence Mission Qualification and Readiness* (8 November 2017)
- AFI 71-101, Volume 4, *Counterintelligence* (2 July 2019)
- Office of the Director of National Intelligence, Office of General Counsel, *Intelligence Community Legal Reference Book*; <https://www.dni.gov/index.php/who-we-are/leadership/general-counsel/ic-legal-reference-book>

FOREIGN CRIMINAL JURISDICTION

United States service members, Department of Defense (DoD) civilian employees and, in certain circumstances, DoD contractors (collectively “DoD personnel”) serving in or deployed to locations outside the U.S. may be subject to criminal proceedings by both the host nation (HN) and the U.S. for offenses allegedly committed in the HN. It is the policy of the DoD and the Department of the Air Force to maximize the exercise of U.S. jurisdiction over DoD personnel to the extent permissible under applicable status of forces agreements (SOFA) or other forms of jurisdiction arrangements, while also protecting, to the maximum extent possible, the rights of DoD personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons; and, if arrested, to secure, where possible, the release of DoD personnel to the custody of U.S. authorities pending completion of all foreign judicial proceedings. This policy also applies to dependents of DoD personnel (command-sponsored and non-command sponsored) when those dependents are in a foreign country accompanying DoD personnel (collectively “dependents”).

Jurisdiction

- Unless an exception has been granted, the HN has jurisdiction under most SOFAs and international law over any person, including another nation’s service members, physically within its borders based on territorial sovereignty
- Simultaneously, the U.S. always has jurisdiction over its service members for UCMJ offenses as the UCMJ applies extraterritorially
 - Normally only one nation will exercise criminal jurisdiction against the service member. That nation is referred to as having primary jurisdiction.
 - Primary jurisdiction of the case is often governed by the terms of any applicable SOFA or comparable agreement with the particular HN. In certain peace operations, especially those run by the United Nations, a status of mission agreement (SOMA) may be used instead of a SOFA. In this discussion, SOFA will refer to both SOFAs and SOMAs.

Violations of Host Nation (HN) Law

- If a U.S. service member commits an offense that violates HN law, regardless of whether it violates the UCMJ, numerous actions may be triggered.
 - Commanders will make consistent efforts with appropriate officials of the HN to maximize U.S. jurisdiction to the extent practicable and consistent with applicable agreements. If jurisdiction is not waived by the HN, commanders also generally have an obligation to place U.S. service members on “international hold” pending resolution of criminal cases within the HN.
 - For DoD civilian employees and, in certain circumstances, DoD contractors and dependents, the designated commanding officer (DCO) may request that the HN waive jurisdiction if he or she determines that suitable action can be taken under existing U.S. laws or administrative regulations. The DCO is designated by the appropriate geographic Combatant Commander (CCDR).
 - U.S. service members generally are made available to HN officials by commanders in consultation with the local staff judge advocate (SJA). Keep in mind that specific timing of release varies by country. Consultation and cooperation with HN law enforcement agencies is always desirable, but it should be noted that in some HNs, local law enforcement have the right to enter the installation to arrest the member regardless of the desire for consultation and cooperation.

- U.S. service members, DoD civilian employees, and, in certain circumstances, DoD contractors and dependents facing HN criminal charges may request that the Department of the Air Force employ legal counsel and pay counsel fees, court costs, bail, and other expenses incident to the representation. They may also request a Military Legal Advisor (appointed by the SJA) to advise the member on U.S. related matters arising out of the criminal charges.
- U.S. service members, DoD civilian employees, and in certain circumstances, DoD contractors, and dependents will have a trial observer, usually a designated judge advocate, appointed by the U.S. Chief of Mission, monitor HN criminal proceedings to report whether the trial was fair. If convicted by a HN court, U.S. service members, DoD civilian employees and in certain circumstances, DoD contractors, and dependents face HN sentencing, including the possibility of confinement in the HN.
- The DoD seeks to assure that U.S. service members, DoD civilian employees, and, in certain circumstances, DoD contractors and dependents when in the custody of foreign authorities, are treated fairly at all times. DoD further seeks to assure that when confined (pretrial, during trial, and post-trial) in foreign penal institutions, these personnel are treated appropriately and are entitled to all the rights, privileges, and protections of personnel confined in U.S. military facilities.
- U.S. service members, DoD civilian employees, and, in certain circumstances, DoD contractors, and dependents who are victims of a crime being adjudicated by the HN criminal justice system may request payment of counsel fees for representation in the case and other related expenses in accordance with applicable laws

Status of Forces Agreements (SOFAs)

- The major SOFAs (NATO, Japan, and Korea) contain similar formulas for determining which country gets to exercise jurisdiction over U.S. personnel for criminal offenses
 - Exclusive jurisdiction belongs to:
 - U.S. for crimes under U.S. military or other applicable law that are not violations of HN law (e.g., absent without leave (AWOL), disrespect, and disobeying orders)
 - HN for acts that are crimes under the HN's laws but not under U.S. law (e.g., religious crimes, political crimes, and certain negligent acts that, under U.S. law, do not rise to the level of criminal conduct)
 - Official duty cases: When the offense arises out of an act in the performance of the U.S. service member's official duty
 - Concurrent (shared) jurisdiction occurs when conduct is criminal under both U.S. and HN law. The HN has the primary right to try all concurrent cases, except when the crime affects only U.S. parties or U.S. property (also known as *Inter se*)
 - DoD policy is to maximize U.S. jurisdiction, subject to relevant international agreements
 - With concurrent jurisdiction, when the HN has the primary right to try a case, the U.S. will normally request a waiver of jurisdiction from the HN
 - The procedures for and the likely success of a request for waiver vary depending on the HN and, frequently, the seriousness of the offense (the more serious the offense, the less likely the waiver will be granted)
 - When a waiver is granted, the U.S., pursuant to treaty or other appropriate legal authority, may be required to report to the HN the final result of the action, if any, taken against the U.S. service member(s), DoD civilian employees, and, in certain circumstances, DoD contractors

- In other HNs not covered by the major SOFAs, there may be other relevant bilateral agreements or diplomatic notes. The SJA should be consulted regarding jurisdiction and procedures.

DoD Civilian Employees and Dependent Family Members Accompanying the Force

- DoD civilian employees and dependent family members accompanying U.S. forces abroad are normally considered subject to the terms of the applicable SOFA
- The HN will have jurisdiction based on its territorial sovereignty, but the U.S. commander usually does not have UCMJ authority over these persons
- In the past, if the HN ceded primary jurisdiction to the U.S., or otherwise chose not to exercise jurisdiction, the options of the commander were limited to administrative procedures (e.g., Family Member Misconduct Boards, early return of dependents (ERD), and employment disciplinary procedures, if appropriate)
- To remedy this problem, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA) of 2000. MEJA extends U.S. jurisdiction to cover offenses committed by dependents and other civilians accompanying our forces if the criminal act is punishable by at least one year in confinement. This act allows the Department of Justice, not the DoD or Department of the Air Force, to prosecute the offending civilian. MEJA can also extend jurisdiction over military personnel and contractors' employees who are not normally resident in the HN.
- Congress also amended Article 2a(10), UCMJ, to provide jurisdiction over civilians serving with or accompanying U.S. armed forces in the field during either declared war or a contingency operation

Absence of a SOFA or Other Agreement

- The prevailing international view is that, in the absence of an agreement to the contrary, criminal jurisdiction rests exclusively with the HN. While the U.S. has worldwide personal jurisdiction over U.S. service members, the exercise of that jurisdiction in the HN without HN permission may be considered a breach of its territorial sovereignty.

REFERENCES

Counsel Before Foreign Judicial Tribunals and Administrative Agencies, 10 U.S.C. § 1037

Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261 *et seq.*

32 C.F.R. Part 151, Foreign Criminal and Civil Jurisdiction (2019)

DODI 5525.01, *Foreign Criminal and Civil Jurisdiction* (31 May 2019)

DoDI 5525.09, *Compliance With Court Orders By Service Members and DoD Civilian Employees, And Their Family Members Outside The United States* (23 April 2019)

AFJI 51-706, *Status of Forces Policies, Procedures, and Information* (15 December 1989), certified current 8 January 2016

AFI 51-402, *International Law* (6 August 2018)

DEFENSE SUPPORT OF CIVIL AUTHORITIES

Defense Support of Civil Authorities (DSCA) is support provided by military forces to prepare, prevent, protect, respond, and recover from domestic incidents and other qualifying domestic events. The Department of Air Force DSCA is derived from its capabilities employed in support of the Federal DSCA mission in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events. "Special event," in this context, means an international or domestic event, contest, activity, or meeting, which by its very nature, or by specific statutory authority or regulatory authority, may warrant security, safety, and/or other logistical support or assistance from the Department of Defense (DoD) (e.g., Presidential inaugurations, international summits, the Olympics, and World Cup soccer games). The federal government maintains a wide array of capabilities and resources that, in accordance with governing statutes, as well as DoD and Department of the Air Force regulations and policy, can be made available to civil authorities upon request. While the DoD is normally the lead agency for homeland defense missions, the DoD conducts DSCA operations in support of another primary federal agency supporting a state, local, territorial, or tribal response.

DSCA Generally

- DSCA is initiated when civil authorities or qualifying entities request DoD assistance or when assistance is authorized by the President of the United States (POTUS) or the Secretary of Defense (SecDef)
 - Unless approval authority is delegated by SecDef, all DSCA requests shall be submitted to the Office of the Executive Secretary of the Department of Defense
 - Except for immediate response and emergency authority, as well as situations in which SecDef has delegated authority to the commanders of USNORTHCOM and USINDOPACOM via the DSCA Standing execute order (EXORD), only SecDef may approve requests from civil authorities or qualifying entities for Federal military support for:
 - Response to civil disturbances
 - Civil disturbance operations generally require authorization from POTUS (but see discussion of emergency authority below)
 - Response to chemical, biological, radiological, nuclear, and high-yield explosives (CBRNE) incidents
 - Assistance to civilian law enforcement organizations
 - Response with potentially lethal assets, which includes:
 - The lending of arms, vessels, aircraft, or ammunition
 - Assistance to the Department of Justice (DoJ) in emergency situations involving weapons of mass destruction
 - Assistance to the DoJ concerning prohibited transactions involving nuclear material
 - Support to counterterrorism operations
 - Support to civilian law enforcement authorities in situations where it is reasonable to anticipate a confrontation between civilian law enforcement and civilian individuals or groups
 - The Joint Staff (JS), upon SecDef approval of DoD assistance, coordinates with the Services to source the assistance to be provided

- Based on the capabilities required, Department of the Air Force assets may be directed to provide assistance
- At the request of a State governor, POTUS may declare a major disaster or emergency under the Stafford Act, 42 U.S.C. §§ 5121 *et seq.*
 - FEMA is generally assigned as the lead federal agency
 - The DoD supports the lead federal agency through either a SecDef approved request for assistance or a SecDef approved mission assignment
- Federal military forces employed for DSCA are to remain under Federal military command and control at all times
- Per DoDD 3025.18, *Defense Support of Civil Authorities*, requests for DSCA, except requests for support under immediate response authority and mutual or automatic aid arrangements (such as reciprocal fire protection agreements under 42 U.S.C. §§ 1856-1856p and governed by DoDI 6055.06, *DoD Fire and Emergency Services (F&ES) Program*), must be submitted in writing
- Written requests shall include a commitment to reimburse the DoD in accordance with the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121 *et seq.*), the Economy Act (31 U.S.C. § 1535), or other statutory reimbursement authorities
 - Support may be provided on a non-reimbursable basis only if required by law or if both authorized by law and approved by the appropriate DoD official
- All DSCA requests for assistance must be evaluated for:
 - Legality (compliance with laws)
 - Lethality (potential use of lethal force by or against DoD Forces)
 - Risk (safety of DoD Forces)
 - Cost (including the source of funding and the effect on the DoD budget)
 - Appropriateness (whether providing the requested support is in the interest of the DoD)
 - Readiness (impact on the DoD's ability to perform its primary missions)
 - Assistance may not be provided if such assistance would adversely affect national security or military readiness
- Domestic use of small unmanned aircraft systems must be executed in accordance with AFMAN 11-502, *Small Unmanned Aircraft Systems* and DoDD 3025.18.
 - Attachment 8 of AFMAN 11-502 provides guidance on the domestic use of small unmanned aircraft systems in U.S. national airspace. Enclosure 2 of the attachment provides the DoD Domestic Use of UAS authorities matrix. O-6 Installation Commanders or O-6 level unit commanders may approve domestic use of Groups 1, 2, and 3 Unmanned Aircraft Systems (UAS) for IRA within airspace delegated by the Federal Aviation Administration (FAA) for DoD use as long as the UAS utilized are restricted to UAS Groups 1-3 and the missions under immediate response authority (IRA) are executed IAW DoDD 3025.18. Geographic combatant commanders may approve (cannot be further delegated) domestic use of Group 1-3 UAS for DSCA Incident Awareness and Assessment (IAA). State governors or Adjutant Generals may approve their respective National Guards' use of UAS Groups 1-3 for state use for Search and Rescues (SAR) or IAA operations.
 - Any domestic use of UASs must be in accordance with FAA regulations and other applicable laws, policies, and memoranda of agreement concerning UAS use in the national air space

Matters Not Within Scope of DSCA

- Joint investigations of matters within their respective jurisdictions conducted by military criminal investigative organizations (e.g., Air Force Office of Special Investigations (AFOSI)) and civilian law enforcement agencies, where each is using its own forces and equipment
- Assistance provided by DoD intelligence and counterintelligence components in accordance with DoDD 5240.01, *DoD Intelligence Activities*, Executive Orders 12333 and 13388, DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities (Procedures 1-10)*, DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons* (Procedures 11-13), and other applicable laws and regulations
- Support provided in response to foreign disasters (e.g., foreign consequence management or foreign humanitarian assistance/disaster response)

Immediate Response Authority (IRA)

- Upon request and without SecDef approval, Department of the Air Force installation commanders may temporarily employ the resources under their control to save lives, prevent human suffering, or mitigate great property damage within the United States. IRA is always subject to higher headquarters direction and limitation. See AFI 10-801, *Defense Support of Civil Authorities*, paragraph 2.13.
 - For support under IRA to be proper, “imminently serious conditions” must be present such that time does not permit seeking approval from higher authority
 - Due to the emergent nature of the situation, the initial request for DoD assistance may be made orally, but it should be followed with a written request at the earliest opportunity. Air Force and Space Force commanders should inform civil authorities that oral requests for assistance must be followed by a written request that includes an offer to reimburse the DoD at the earliest available opportunity.
 - The Air Force or Space Force commander directing an IRA response immediately notifies the National Joint Operations and Intelligence Center (NJOIC) through the chain of command
 - Where appropriate or legally required, support provided under IRA should be provided on a cost-reimbursable basis. However, Air Force and Space Force commanders should not delay or deny IRA support based on the fact that the requester is unable or unwilling to commit to reimbursing the DoD.
 - IRA does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory, and therefore violate the Posse Comitatus Act
 - Air Force and Space Force commanders must consider the impact providing immediate response would have on military mission requirements. Commanders must not jeopardize the Department of the Air Force mission to provide immediate response.
 - An immediate response ends when the urgent need giving rise to the response is no longer present (i.e., when there are sufficient non-DoD resources available to adequately respond and that agency or department is responding) or when the initiating DoD official or a higher authority directs an end to the response
 - The DAF commander directing an IRA response reassesses as soon as practicable, but if immediate response activities have not yet ended, not later than 72 hours after the request for assistance was received

- In accordance with SecDef's policy memorandum titled *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace*, DoD UAS categorized in groups 1-3 may be authorized within airspace delegated by the FAA for DoD use, in accordance with DoDD 3025.18.
- Air Force and Space Force commanders acting under IRA do not use military force to quell civil disturbances unless specifically authorized by the POTUS in accordance with the Insurrection Act of 1807 or unless permitted under emergency authority as outlined below

Emergency Authority

- Department of the Air Force commanders have the authority, in extraordinary emergency circumstances where prior POTUS authorization in accordance with the Insurrection Act of 1807 is not possible and where duly constituted local authorities are unable to control the situation, to temporarily engage in activities necessary to quell large-scale, unexpected civil disturbances when:
 - Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or
 - When duly constituted civil authorities are unable or unwilling to provide adequate protection for federal property or federal governmental functions. However, federal military forces are authorized to protect federal property or functions.

Table 17.1 Table of Authorities

Emergency Authority	Immediate Response Authority (IRA) DoDD 3025.18	Stafford Act 42 U.S.C. §§ 5121-5207	Economy Act 31 U.S.C. § 1535
Authorized for	Save lives, prevent human suffering, mitigate great property damage	Federal Response for declared major disaster or emergency	Order of goods or services between Federal agencies or major organizational unit within agency
Requesting Authority	Civil Authority ^{...}	State Governor ^{****}	Head of an agency or major organizational unit within agency
Requirements	<ul style="list-style-type: none"> - Imminently serious conditions - Time does not permit higher authority approval - Reassess NLT 72 hours - Notify NJOIC thru Service chain 	<ul style="list-style-type: none"> - State resources are overwhelmed - State has implemented Emergency Response Plan - State requests POTUS make Stafford Act declaration 	<ul style="list-style-type: none"> - Funds available - Best interests of U.S. - Cannot be conveniently or cheaply provided by commercial enterprise
Approval Authority	Federal military commanders, Heads of DoD Components, and/or responsible DoD civilian officials (C2 remains w/Svc)	POTUS	Head of agency or major organizational unit within agency
Payment or Reimbursement	Cost-reimbursable basis, but will not be delayed based on inability or unwillingness to make commitment to reimburse	Incremental costs – (per diem, travel, etc.) when FEMA tasks DoD via Request for Assistance (RFA)/ Mission Assignment (MA)	Actual costs – all associated costs including pay and allowances

^{...} Elected and appointed officers and employees who constitute the USG, State governments, D.C., Commonwealth of PR, U.S. territories, and political subdivisions thereof (JP 3-28)

^{****} POTUS has authority to make unilateral Stafford Act declaration when it is determined an emergency exists on property where Federal government exercises exclusive preeminent responsibility or authority (i.e., federal property)

REFERENCES

- Provision of Support for Certain Sporting Events, 10 U.S.C. § 2564
- Prohibited Transactions Involving Nuclear Materials, 18 U.S.C. § 831
- Posse Comitatus Act, 18 U.S.C. § 1385
- Agency Agreements, 31 U.S.C. § 1535
- Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 *et seq.*
- Special Event, 32 C.F.R. § 183.3
- Executive Order 12333, *United States Intelligence Activities* (4 December 1981)
- Executive Order 13388, *Further Strengthening the Sharing of Terrorism Information to Protect Americans* (25 October 2005)
- DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons* (December 1982), incorporating Change 2, 26 April 2017
- DoDD 5240.01, *DoD Intelligence Activities* (27 August 2007), incorporating Change 3, 9 November 2020
- DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016)
- DoDI 3020.52, *DoD Installation Chemical, Biological, Radiological, Nuclear, and High-Yield Explosive (CBRNE) Preparedness Standards* (18 May 2012), incorporating Change 1, 22 May 2017
- DoDD 3025.18, *Defense Support of Civil Authorities* (29 December 2010), incorporating Change 2, 19 March 2018
- DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies* (27 February 2013), incorporating Change 1, 8 February 2019
- DoDI 6055.06, *DoD Fire and Emergency Services (F&ES) Program* (3 October 2019)
- Secretary of Defense (SecDef) Memorandum, *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace* (18 August 2018)
- Joint Publication 3-28, *Defense Support of Civil Authorities* (29 October 2018)
- AFI 10-801, *Defense Support of Civil Authorities* (29 January 2020)
- AFMAN 11-502, *Small Unmanned Aircraft Systems* (29 July 2019)

SMALL UNMANNED AIRCRAFT SYSTEMS

As use of small unmanned aircraft systems (SUAS) by hobbyist/recreational, commercial/civil, and public (i.e., government) users increases, so do questions regarding their use on or near military installations. The threats posed to the safety and security of Department of the Air Force facilities and assets are constantly being evaluated. Commanders and judge advocates should coordinate with their MAJCOMs, Field Commands, and AF/JA – Operations and International Law Directorate (JAO) when issues arise.

Definitions

- The Department of Defense (DoD) categorizes unmanned aircraft systems (UAS) into five groups based on the weight, altitude, and speed of the system
 - SUASs generally fall within Groups 1 and 2. Group 3 serves as an overlapping middle ground that includes the commercially available DJI Phantom and large UAS platforms such as the MQ-9 Reaper.
- The FAA considers SUAS to be any aircraft less than 55 pounds and requires registration for all SUASs between .55 and 55 pounds. The FAA has also issued operating rules for SUASs that vary depending on whether the SUAS is flown for commercial or non-commercial uses.

Operation of Non-Governmental SUASs on or over Military Installations

- Airspace within the United States, including airspace above DoD installations, is regulated by the Federal Aviation Administration (FAA)
 - SUAS operations in the airspace above military installations must comply with FAA regulations and guidance. Installation commanders generally do not have the authority to further restrict the use of airspace above an installation.
 - In 2017, at the request of the DoD, the FAA promulgated Special Security Instructions (SSIs) under 14 C.F.R. § 99.7. The SSIs prohibit any UAS flight within the airspace above most CONUS military installations. The prohibitions extend from the ground to 400 feet above ground level (AGL) and encompass installation perimeters. An interactive map of current restricted airspace can be found at <https://www.arcgis.com/apps/webappviewer/index.html?id=9c2e4406710048e19806ebf6a06754ad>.
 - UAS flight operations are prohibited at all times and airspace violations are subject to administrative, civil, or criminal penalties. The NOTAM contains exceptions for certain UAS operations, including government or military UAS operations or other pre-approved flights. The DoD/FAA Policy Board for Federal Aviation (PBFA) has promulgated Joint Standard Operating Procedures (J-SOP) that address the means for gaining permission to conduct planned UAS activities in the SSI airspace previously established over all military bases (up to 400 feet above ground level).
 - FAA regulations fall into three categories of UAS use: public, commercial, and hobby or recreational use. Regardless of size or cost, as a general matter, aircraft purchased by the Armed Forces or operated by a Service for military purposes are public aircraft and are ineligible for exceptions available to model aircraft operators. Note that with respect to UAS used as model aircraft, the FAA has reiterated that to qualify as a model aircraft, the aircraft must be operated purely for recreational or hobby purposes.
- For authorized flights on or over military installations, operators must comply with certain FAA rules depending on the use of the aircraft

- In June 2016, the FAA promulgated the “Small Unmanned Aircraft Rule” (14 C.F.R. Part 107 of the Federal Aviation Regulations), which imposes pilot and aircraft certification requirements and operational restrictions on commercial SUAS
- When flying SUAS for hobby or recreational purposes under the Special Rule for Certain Unmanned Aircraft Systems, SUAS are required to operate in a manner as to not endanger the safety of the U.S. National Airspace (NAS). For example, operators are expected to contact the airport operator and airport air traffic control (ATC) tower (when applicable) if they are planning to operate a SUAS within five nautical miles of an airport. Installations not covered by an SSI, such as joint use airfields, may receive such notifications from groups or individuals operating SUAS for this reason.
- The term “airport” is broadly defined and would likely include any military airfield. The statutory definition used by the FAA is contained in 49 U.S.C. § 47102(2) and the FAA provides further information about airports on its website.
- Joint use airfield managers and ATC towers (or equivalent) must be aware of FAA regulations regarding the use of SUAS to be able to respond accordingly to notifications from SUAS operators. Note that the requirement is to provide notification only to the airport and ATC tower, not to request permission to operate.
- Do not assume that those requesting to operate near or over an installation are legally entitled to do so. SUAS users may not understand the regulations and restrictions that pertain to them. If there are questions about particular SUAS operations, coordinate with your local FAA office.
- Be aware of any airspace authorities that may have been granted to the installation commander (or designee) by the FAA to restrict or prohibit SUAS activities. If such a delegation exists, it will generally be in the form of a memorandum of agreement (MOA) between the installation ATC (or similar) and the FAA.
- Installation commanders, consistent with their authority over the installation and its activities, may prohibit or limit the operation of SUAS on the installation, to include a SUAS taking off from the installation, a SUAS landing on the installation, and controlling a SUAS from the installation
 - As previously noted, the authority of an installation commander does not generally extend to restricting the use of the airspace above an installation. The national airspace, including the airspace above defense installations, falls under the exclusive jurisdiction of the FAA. Absent a delegation of authority from the FAA to the installation commander, the commander has no independent authority to place any restrictions on the use of that airspace.
- While simply flying a SUAS near or above an installation may be permissible under current FAA regulations, if the SUAS is being used to conduct another activity (e.g., taking photos or videos), additional restrictions may apply
 - Installation judge advocates should familiarize themselves with state and local laws relating to UAS that may be applicable to operations near, on, or over the installation
 - Federal laws may also prohibit certain activities
 - 18 U.S.C. § 795, *Photographing and Sketching Defense Installations* and 18 U.S.C. § 796, *Use of Aircraft for Photographing Defense Installations*, criminalize photographing “vital military and naval installations or equipment without first obtaining permission of the commanding officer.” Note that such installations must be designated by the President, Secretary of Defense (SecDef), or a service secretary.

- Executive Order 10104, *Defining Certain Vital Military and Naval Installations and Equipment as Requiring Protection Against the General Dissemination of Information Relative Thereto*, contains the President's definitions of these items. They are broadly defined to include all military, naval, or Department of the Air Force installations and equipment which are now classified, designated, or marked under the authority or at the direction of the President, SecDef, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force (SecAF) as "top secret," "secret," "confidential," or "restricted," and all military, naval, or Department of the Air Force installations and equipment which may hereafter be so classified, designated, or marked with the approval or at the direction of the President.
- Monitoring the content of suspected downlink video does not violate 18 U.S.C. §§ 2511, et seq., if sufficient consent can be shown or the downlink is configured to be "readily accessible to the general public" under 18 U.S.C. § 2510(16)
- Commanders retain the inherent right of self-defense against SUAS that pose a threat to DoD installations, assets, and personnel consistent with the provisions of CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for Use of Force*. However, DoD has issued additional classified guidance on a commander's authority to counter SUAS. Commanders should consult this guidance and related Department of the Air Force guidance before engaging in any counter-small UAS operations ("C-SUAS" operations).
 - 10 U.S.C. § 130i authorizes SecDef to take certain actions necessary to mitigate the threat of an unmanned aircraft or unmanned aircraft systems that pose an imminent threat to the safety or security of certain assets or facilities of national security significance. Commanders of such covered assets and facilities should consult their staff judge advocate (SJA) on the implementation of this authority.
- At OCONUS locations, the host nation generally regulates the use of the airspace above U.S. military bases. Status of Forces Agreements (SOFAs) or other host nation agreements may give installations some rights with respect to airspace control.

Operation of SUAS within the United States by DoD Organizations ("Blue SUAS" Operations)

- The 18 August 2018 SecDef memorandum, *Guidance for the Domestic Use of Unmanned Aircraft Systems in the U.S. National Airspace*, delegated military Services the authority to approve domestic use of Group 1-3 UASs (also referred to as "Blue SUAS" operations). The Department of the Air Force promulgated its guidance in AFMAN 11-502, *Small Unmanned Aircraft Systems*.
- Additionally, geographic combatant commanders were given approval authority for domestic use of Group 1-3 UAS for force protection or Defense Support of Civil Authorities (DSCA) Incident Awareness and Assessment (IAA). Finally, state governors may approve their respective National Guards' domestic use of Group 1-3 UAS for state/civil authorities' Search and Rescue (SAR) and IAA operations.
- Air Force Special Operations Command was designated lead command for Blue SUAS operations and coordinates with MAJCOMs to develop guidance for the conduct and execution of SUAS operations and training
- Any domestic use of UAS must be in accordance with FAA regulations and other applicable laws, U.S., Department of Defense, and Department of the Air Force policies, and memoranda of agreement concerning UAS use in the NAS
- Pursuant to the 23 May 2018 Deputy Secretary of Defense memorandum, *Unmanned Aerial Systems Cybersecurity Vulnerabilities*, Department of the Air Force units may neither purchase nor

use commercial off-the-shelf (COTS) UASs without prior approval from the Deputy Secretary of Defense. On 1 June 2018, the Deputy Secretary of Defense issued a memorandum titled, *Delegation of Authority to Approve Exemptions for Using Commercial-Off-The-Shelf Unmanned Aerial Systems in Support of Urgent Needs*. This memorandum provided for the delegation of authority to approve exemptions for using COTS UAS in support of urgent needs. The Department of the Air Force's process for requesting and processing exemption approvals is set forth in AFMAN 11-502. Units requesting an exemption must contact Air Force Special Operations Command via email at AFSOC.A3OU.WF@us.af.mil for the exemption template and processing instructions.

- AF operation of SUAS is subject to specific training requirements and other restrictions, to include:
 - A 2013 memorandum of agreement with the FAA requires "pilots/operators and crew members of DoD UAS ... [to] be qualified and medically certified by the appropriate Military Department to operate in the class of airspace in which operations are to be conducted." The term "operator" is a DoD specific term used to "describe individuals with the appropriate training and Military Department certification for the type of UAS being operated, and, as such, is responsible for the UAS operations and safety. It is understood that all DoD UAS will be flown with a designated Pilot in Command (PIC)."
- Airworthiness approval for any category of SUAS must be granted prior to flight by the appropriate authority pursuant to AFMAN 11-502
 - SUAS operators are trained, certified, and authorized to plan and conduct operations in approved airspace
 - SUAS operations are conducted only in authorized airspace and SUAS operators will be appropriately certified or directly supervised by an instructor in order to conduct operations within the class of airspace authorized for operations
 - SUAS must also have proper and adequate technical orders for their use, operation, and maintenance, designed to ensure safety of flight and avoid mishaps resulting in damage and potential government liability to persons or property, both military and civilian
 - SUAS should be tracked for maintenance and accountability by a SUAS equipment custodian through the SUAS Manager (SUASMAN) web application pursuant to AFMAN 11-502 and consistent with AFI 21-103, *Equipment Inventory, Status and Utilization Reporting*.
 - Units operating SUAS must have a unit-specific installation commander approved concept of employment (CONEMP) when operating on or off military installations
 - CONEMP must address the following: statement of mission and objectives, training and certification requirements, currency requirements, personnel protective equipment, cyber security, domestic privacy concerns, electromagnetic and radio frequency emission spectrum approval, coordination requirements with all applicable agencies, operational area description, flight approval procedures, night operations, dropping of objects (if applicable), risk management, communications, deconfliction, contingencies, and statement of compliance with applicable laws and policies
 - Operation of SUAS must also comply with DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities*, DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons* (Procedures 11-15), AFI 14-404, *Intelligence Oversight*, and applicable AFOSI issuances

Operation of SUAS Outside of the United States by DoD Organizations

- In addition to any DoD or Service regulation applicable to the operation of SUAS by military organizations, the operation of SUAS within the national airspace of another country may be severely restricted by the domestic laws of that country
 - If no specific rights have been granted in a SOFA, basing agreement, or other host nation agreement, assume that specific permission will likely be needed to operate a SUAS. For example, even if citizens of the host nation are typically allowed to operate SUAS, do not assume that U.S. operations are authorized.
 - Follow all applicable coordination and approval procedures to ensure that operations within the airspace of another country are authorized by the host nation and conducted in conformity with all applicable conditions of the permission granted. Be aware that conditions frequently include respect for the laws and regulations of that host nation.

REFERENCES

Protection of Certain Facilities and Assets from Unmanned Aircraft, 10 U.S.C. § 130i

Photographing and Sketching Defense Installations, 18 U.S.C. § 795

Use of Aircraft for Photographing Defense Installations, 18 U.S.C. § 796

Interception and Disclosure of Wire, Oral, or Electronic Communications Prohibited, 18 U.S.C. §§ 2511, *et seq.*

Special Security Instructions, 14 C.F.R. § 99.7

Special Authority for Certain Unmanned Systems, 49 U.S.C. § 44807

Small UAS Rule, 14 C.F.R. Part 107 (2012)

DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons* (Procedures 11-15) (December 1982), incorporating Change 2, 26 April 2017

DoDD 5148.13, *Intelligence Oversight* (26 April 2017)

DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016)

Executive Order 10104, *Defining Certain Vital Military and Naval Installations and Equipment as Requiring Protection Against the General Dissemination of Information Relative Thereto* (1 February 1950)

Secretary of Defense (SecDef) Memorandum, *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace* (18 August 2018)

Deputy Secretary of Defense (DSD) Policy Memorandum, *Unmanned Aerial Systems Cyber Security Vulnerabilities* (23 May 2018)

Deputy Secretary of Defense Memorandum 17-00X, *Supplemental Guidance for Countering Unmanned Aircraft* (5 July 2017) [CLASSIFIED]

Deputy Secretary of Defense Policy Memorandum 16-003, *Interim Guidance for Countering Unmanned Aircraft* (18 August 2016) [CLASSIFIED]

Deputy Secretary of Defense Memorandum, *Delegation of Authority to Approve Exemptions for Using Commercial-Off-The-Shelf Unmanned Aerial Systems in Support of Urgent Needs* (1 June 2018)

AFI 14-404, *Intelligence Oversight* (3 September 2019)

AFI 21-103, *Equipment Inventory, Status, and Utilization Reporting* (30 April 2020)

AFPD 11-5, *Small Unmanned Aircraft Systems* (7 June 2019)

AFMAN 11-502, *Small Unmanned Aerial Aircraft Systems* (29 July 2019)

Memorandum of Agreement Concerning the Operation of Department of Defense Unmanned Aircraft Systems in the National Airspace System (16 September 2013)

AFMC/CC, Commercial-off-the-Shelf (COTS) Counter-small Unmanned Aircraft Systems (UAS) Procurement Policy Memorandum (24 October 2019)

DoD/FAA Policy Board for Federal Aviation, *FAA/DoD J-SOP for UAS-Specific SSI – Version 1.0* (6 April 2017)

DoD/FAA Policy Board for Federal Aviation, *Addendum to the FAA/DoD J-SOP for UAS-Specific SSI: Procedures for Approving Access* (2018)

CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for Use of Force* (13 June 2005)

FAA Unmanned Aircraft Systems (UAS), <http://www.faa.gov/uas/>

ArcGIS FAA UAS Data on a Map, <https://www.arcgis.com/apps/webappviewer/index.html?id=9c2e4406710048e19806ebf6a06754ad>

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CHAPTER EIGHTEEN: CYBER LAW

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CYBER LAW OVERVIEW

The term “cyber law” is used to describe specialized subsets of traditional legal fields (e.g., criminal law, international law, operational law, administrative law, privacy law, tort law, etc.). This chapter addresses the legal issues in cyberspace operations that Department of the Air Force commanders are most likely to encounter. Among these are (1) criminal law matters such as searching and seizing computers, accessing electronically stored information (ESI), and computer misuse, (2) law of war and international law matters to include defending Department of the Air Force networks and attacking adversary networks, as well as (3) the application of privacy law, notably the Freedom of Information Act (FOIA) and the Privacy Act, and safeguarding Personally Identifiable Information. Most of these discrete areas of the law have their own chapter or section throughout this publication, so this chapter will focus on their cyber-specific aspects.

While the content of this chapter continues to be revised from previous editions of this publication, it is important to remember that technology, law, and policy in this area are dynamic and emerging. Commanders and judge advocates should seek the most current guidance from subject matter experts at the Department of the Air Force’s Operations and International Law Directorate (AF/JAO), located at the Pentagon, and the 16th Air Force (16 AF) and 67th Cyberspace Wing (CW) legal offices, both located at Joint Base San Antonio-Lackland, Texas.

Key Roles and Responsibilities

- U.S. Cyber Command (USCYBERCOM):

- In May 2018, USCYBERCOM was elevated to a Unified Combatant Command (UCC). Its responsibilities include, but are not limited to:
 - Directing operations and defense of the Department of Defense (DoD) Information Network (DODIN)
 - Planning and executing global cyberspace operations
 - Fulfilling the general responsibilities of a UCC
- USCYBERCOM is the joint force trainer and joint force provider of cyber operations forces, and has limited cyber operations-peculiar acquisition authority
- USCYBERCOM accomplishes its missions within three primary lines of operation: secure, operate, and defend the DODIN; defend the nation from attack in cyberspace; and provide cyberspace support as required to combatant commanders (CCDRs)

- U.S. Space Force:

- Serves as the lead service for Department of the Air Force enterprise satellite communications operations
- Direct United States Space Force-assigned mission defense teams when agreed between Chief of Staff of the Air Force (CSAF) and Chief of Space Operations (CSO) to manage service-level organize, train, and equip of mission defense teams in support of United States Space Force space mission systems

- Joint Force Headquarters-Cyberspace (JFHQ-C) (AF):

- A functional component of USCYBERCOM, with Air Force, Army, and Navy forces assigned
- It is one of four JFHQ-Cs established to provide general support to Combatant Commands for the Offensive Cyberspace Operations mission

- It is currently aligned to support USEUCOM, USSTRATCOM, USTRANSCOM, and USSPACECOM
- 16th Air Force (AFCYBER):
 - AFCYBER is the Air Force service component to USCYBERCOM
 - AFCYBER executes the DODIN Operations and Defensive Cyberspace Operations Internal Defense Measures (DCO-IDM) missions on the Air Force Information Network (AFIN) with assigned forces
 - USCYBERCOM exercises combatant command (command authority) (COCOM) of AFCYBER and Joint Force Headquarters-DODIN (JFHQ-DODIN), another functional component of USCYBERCOM, exercises tactical control (TACON) of AFCYBER
 - The commander of AFCYBER is delegated the Secretary of Defense (SecDef) established Directive Authority for Cyberspace Operations (DACO) for the AFIN, allowing issuance of cyber orders to non-assigned Air Force units (i.e., MAJCOMs, Field Commands, wings, deltas, and communications squadrons) as required to ensure unified operation and defense of the AFIN
- The 16 AF Commander also performs the following functions:
 - Integrates multisource intelligence, surveillance, and reconnaissance (ISR), cyber warfare, electronic warfare (EW), and information operations capabilities across the conflict continuum
 - Oversees signals intelligence (SIGNIT) forces as the Service Cryptologic Component Commander
 - Oversees intelligence forces as one of the Air Force Defense Intelligence Component Head
 - Commands cyber operations forces as the Commander, Air Forces Cyber (AFCYBER), and Commander, Joint Force Headquarters-Cyber (Air Force) [JFHQ-C (AF)]
- 616th Operations Center (OC):
 - The 616 OC serves two primary and distinct functions: (1) coordination of ISR activities by service-retained intelligence forces, and (2) command and control (C2) of cyberspace operations forces assigned to AFCYBER and JFHQ-C (AF)
 - The 616 OC also issues cyber orders of the AFCYBER commander to Air Force units operating on the AFIN, many of which are derived from USCYBERCOM and JFHQ-DODIN orders or operations addressing DODIN-wide issues. These orders may flow through MAJCOM Cyber Coordination Centers to subordinate units, or may be issued directly by the 616 OC.
- Deputy Chief Information Officer (SAF/CN):
 - Provides policy and guidance to foster an operationally resilient, reliable, and secure AFIN which meets DoD and DAF requirements
 - SAF/CN has delegated some cybersecurity-related responsibilities to the 16 AF/CC
- Commander, ACC (ACC/CC):
 - Serves as the lead command for the cyber warfare operations mission area. The duties and responsibilities of the ACC/CC are outlined in paragraph 3.7 of DAFPD 17-2, *Cyber Warfare Operations*.
 - Responsible for organizing, training, and equipping Air Force cyberspace operations forces and is the parent MAJCOM of 16 AF

Cyberspace Operations – Terms and Definitions

- Department of Defense Information Network (DODIN):
 - The set of information capabilities and associated processes for collecting, processing, storing, disseminating, and managing information on-demand to warfighters, policy makers, and support personnel, whether interconnected or stand-alone, including owned and leased communications and computing systems and services, software (including applications), data, security services, other associated services, and national security systems
 - The DODIN comprises all of DoD cyberspace, including the classified and unclassified global networks (e.g., NIPRNET, SIPRNET, Joint Worldwide Intelligence Communications System) and many other components, including DoD-owned smartphones, radio frequency identification tags, industrial control systems, isolated laboratory networks, and platform information technology (PIT)
- Air Force Information Network (AFIN):
 - The Department of the Air Force capabilities and associated processes for collecting, processing, storing, disseminating, and managing information on-demand to warfighters, policy makers, and support personnel, whether interconnected or stand-alone, including owned and leased communications and computing systems and services, software (including applications), data, security services, other associated services and national security systems
 - AFIN is the Department of the Air Force's portion of the DODIN
- Cyberspace: A global domain within the information environment consisting of the interdependent networks of information technology infrastructures and resident data, including the internet, telecommunications networks, computer systems, and embedded processors and controllers
- DODIN Operations: Operations to secure, configure, operate, extend, maintain, and sustain DoD cyberspace and to create and preserve the confidentiality, availability, and integrity of the DODIN
- Defensive Cyberspace Operations (DCO): Missions executed to defend the DODIN, or other cyberspace that DoD cyberspace forces have been ordered to defend, from active threats in cyberspace. These missions are intended to preserve the ability to utilize blue cyberspace capabilities and protect data, networks, cyberspace-enabled devices, and other designated systems by defeating on-going or imminent malicious cyberspace activity.
- Directive Authority for Cyberspace Operations (DACO): The authority to issue orders and directives to all DoD components to execute global DODIN operations and defensive cyberspace operations internal defensive measures
- Offensive Cyberspace Operations (OCO): Missions intended to project power in and through foreign cyberspace through actions taken in support of CCDR or national objectives

REFERENCES

Joint Publication (JP) 3-12, *Cyberspace Operations* (8 June 2018)

DAFPD 17-2, *Cyber Warfare Operations* (27 October 2020)

LEGAL ISSUES IN AIR FORCE INFORMATION NETWORK (AFIN) OPERATIONS

AFIN Operations Authority

- The operational chain of command, through United States Cyber Command (USCYBERCOM), delegated the authority to secure, operate, and defend the Air Force Information Network (AFIN) to the Commander of Air Forces Cyber (AFCYBER). This authority includes Directive Authority to Conduct Cyberspace Operations (DACO) for the AFIN in order to effectively implement orders from USCYBERCOM and Joint Force Headquarters-Department of Defense Information Network (JFHQ-DODIN) and to ensure the timely and efficient security, operation, and defense of the AFIN. This authority allows the AFCYBER commander to issue orders and directives to compel unity of action to secure, operate, and defend the AFIN.
- Cyber orders issued by the Commander of AFCYBER via the 616th Operations Center (616 OC), are mandatory military orders. It is important to note that the Commander of AFCYBER also serves as the Commander of Sixteenth Air Force (16 AF/CC)).
- 16 AF/CC, acting in his/her role as Commander of AFCYBER or Commander of Joint Force Headquarters-Cyber (JFHQ-C)(Air Force), directs the Department of the Air Force cyberspace forces in executing missions and tasks assigned by USCYBERCOM and exercises Operational Control (OPCON) over Air Force forces assigned/attached to USCYBERCOM in support of joint objectives
- There are significant overlaps between the Department of the Air Force's service responsibility to ensure cybersecurity and interoperability of Department of the Air Force networks (largely vested in SAF/CN) and the USCYBERCOM authority to secure, operate, and defend Department of the Air Force networks which has been delegated to the AFCYBER Commander. However, in addition to the delegations of authority described above, SAF/CN has designated 16 AF as the Component Cybersecurity Service Provider (CSSP) for the AFIN, thus providing 16 AF authority to ensure the AFIN is secure, assured, and interoperable, and that all personnel are appropriately trained.

Computer Monitoring and Stored Communications

- Commanders may have to deal with questions concerning monitoring network user activity (active duty military members, civilian employees, and contractors) or obtaining electronic data stored somewhere on the AFIN. These requests typically come from law enforcement, but they also may be requested by unit commanders, investigative officers, judge advocates, Air Force and Space Force civilian attorneys, safety investigation boards, and similar requestors. The following discussion examines the law in this area, some exceptions, and the process for obtaining these items in the Department of the Air Force.
 - Fourth Amendment: The Fourth Amendment establishes the right to be free from unreasonable government searches and seizures. This applies to electronic systems and communications. What constitutes an unreasonable search is dependent upon whether an individual has a reasonable expectation of privacy (REP).
 - Determination of a REP on any given piece of information on any given computer or computer system (including servers) depends upon a number of factors, such as the owner of the computer (i.e., personal or business), the relationship of the information to the computer system (i.e., in transit or stored), the nature of the data communicated (i.e., metadata or content), the location of the information, and the information owner's citizenship

--- The Department of the Air Force and Department of Defense (DoD) do not recognize a REP on government computers or computer systems. All users are expected to understand and acknowledge the DoD notice and consent banner and sign a user agreement before accessing a government computer or the AFIN. The banner and user agreement both make it clear that communications and data stored on the AFIN are not private and any security measures (such as passwords) are included to protect the U.S. Government and not for personal benefit or privacy.

- Computer Fraud and Abuse Act (18 U.S.C. § 1030): Prohibits unauthorized access (or exceeding authorized access) to any “protected computer.” A “protected computer” includes any computer involved in interstate or foreign commerce or communications, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States. This statute is sometimes referred to as the anti-hacking statute.
- The Electronic Communications Privacy Act (ECPA) (18 U.S.C. § 2510 et seq.): ECPA covers various forms of wire and electronic communications. It includes e-mail, telephone conversations, and data stored electronically. ECPA is broken up into three sections. Title I of ECPA is commonly referred to as the Federal Wiretap Act. Title II is the Stored Communications Act. Title III addresses pen register and trap and trace devices.
- The Wiretap Act (18 U.S.C. §§ 2510 et seq.): Prohibits a third party to a communication from wiretapping, monitoring, or intercepting that communication in transit. The Wiretap Act covers both telephone conversations and electronic communications, and it grants protection to individuals above what is protected by the Fourth Amendment. However, there are numerous exceptions to the Wiretap Act prohibitions that permit most AFIN monitoring and provide options for law enforcement:
 - *The Service Provider Exception* (18 U.S.C. § 2511(2)(a)(i)): Permits service providers to “intercept, disclose, or use” a communication while engaged in activity necessary to the provision of service or the protection of the provider’s rights or property. This authority is broad, but there must be a substantial nexus between the monitoring and the system administrator’s duties to maintain and protect the system.
 - *Consent* (18 U.S.C. § 2511(2)(c)-(d)): Just as in other applications, consent to a “search” eliminates a privacy interest in the subject to be searched. The DoD banner, as mandated by the DoD Chief Information Officer (DoD CIO), obtains consent to monitoring from any potential user prior to authorized use of DoD computer networks. The consent banner and user agreement are now used universally in the Department of the Air Force and are a reliable exception to the Federal Wiretap Act. Note, per the terms of the banner and user agreement, user consent to monitoring does not include consent to monitoring of certain privileged communications for personnel misconduct, law enforcement or counterintelligence investigations.
 - *Pursuant to Foreign Intelligence Surveillance Act* (18 U.S.C. § 2511(2)(e)): This exception will most likely only be used by an intelligence-gathering agency
 - *Communication Readily Accessible to the General Public* (18 U.S.C. § 2511(2)(g)(i)): An intercepted or accessed electronic communication which is readily accessible by the general public (e.g., social media post, status update) is excepted (See also, DoDD 3115.18, *DoD Access to and Use of Publically Available Information (PAI)*)
 - *Trespasser Exception* (18 U.S.C. § 2511(2)(i)): An individual acting lawfully is authorized to intercept the communications of a trespasser into a computer system (i.e., hackers). The Air Force Office of Special Investigations (AFOSI) frequently relies on this exception when conducting counterintelligence investigations.

- *Pursuant to a Court Order* (18 U.S.C. § 2518): Applications for orders authorizing or approving the interception of electronic communications are made in writing to a judge of competent jurisdiction
- Stored Communications Act (18 U.S.C. §§ 2701-2712): The protection in this statute applies to stored communications, rather than in-transit communications covered by the Wiretap Act (see previous)
 - 18 U.S.C. § 2702(a) limits voluntary disclosure of communications or records by those providing electronic communication services “to the public.” The AFIN does not provide electronic communications services to the public. *Bohach v. City of Reno*, 932 F. Supp. 1232 (D.Nev.1996). Accordingly, the Stored Communications Act does not limit the Department of the Air Force’s use of stored communications on the AFIN.
- Pen Register and Trap and Trace Act (18 U.S.C. §§ 3121 et seq.): The protection in this statute applies to information about communications, such as a log of telephone numbers called. In cyberspace, this statute is most often applied to proxy logs and network routing data. Like other portions of the ECPA, this statute contains exceptions for service providers.
- Reliance on the DoD notice and consent banner and user agreement is the usual method by which stored data can be legally obtained in the Department of the Air Force and will apply in most situations. One exception is privileged communications. The DoD notice and consent banner still protects some uses of the content of privileged communications or work product related to personal representation or services by attorneys, psychotherapists, or clergy, to include their assistants. Pursuant to the notice and consent banner, these communications cannot be used in personnel misconduct, law enforcement, or counterintelligence investigations. Commanders should consult with their servicing legal offices if such communications are encountered or they expect to encounter such communications.
- Search authorizations for electronically stored information should not be used in most cases. However, if the totality of the facts and circumstances indicate that the subject has a reasonable expectation of privacy, usually because the government property was issued for exclusive personal use, obtaining a search authorization is warranted. (See AFI 51-201, *Administration of Military Justice*).
- Routine use of search authorizations to collect information from government computer systems would contravene the language in the consent banner and could create a reasonable expectation of privacy in government computer systems

Summary of Legal Standards Relating to Department of the Air Force Networks

- There is no reasonable expectation of privacy on Air Force and Space Force networks
- The DoD banner implemented throughout all Department of the Air Force computer systems, telephone networks, and other electronic communications systems, provides notice of monitoring and is evidence of implied and explicit consent from all users to monitor their activities and retrieve data under the relevant exceptions of the ECPA
- Accordingly, law enforcement and AFOSI personnel do not require a search authorization to examine data for law enforcement purposes on the AFIN and should only seek search authorizations in unusual cases
- Department of the Air Force system administrator actions to operate, maintain, and defend the AFIN are not limited by the Stored Communications Act, the Federal Wiretap Act, or Pen Register Trap and Trace Act

Electronically Stored Information Request Process

- Electronically stored information (ESI) may be requested for any official purpose. Common purposes include: court-martial proceedings, criminal investigations, administrative investigations, commander-directed investigations, civil litigation involving the Department of the Air Force, or retrieving e-mails of an absent member in support of some military mission or duty.
 - The DoD notice and consent banner eliminates the need for search authorization from a search authority in almost all cases (see discussion above)
 - As the Service Cyber Component commander, the AFCYBER Commander is directed and authorized by the Secretary of Defense (SecDef) and the USCYBERCOM Commander to conduct DODIN Operations on the AFIN. This mission includes actions taken to operate the AFIN to include ensuring the confidentiality, availability, and integrity of AFIN data. The AFCYBER Commander has the authority and technical ability to provide authorized personnel with AFIN data as required for official purposes.
 - While AFCYBER has the technical ability to access AFIN ESI, AFCYBER is not the record custodian or record holder for such ESI. Whether to search, how to search, and proper handling and processing of search results is the responsibility of the requestor. Additional information on ESI search responsibilities can be found in AFI 33-322, *Records Management and Information Governance Program*, AFI 51-201, *Administration of Military Justice*, and AFI 51-301, *Civil Litigation*.
 - Additionally, the Air Combat Command Headquarters Cyberspace Capabilities Center is available to help coordinate network searches in response to litigation

Freedom of Information Act (FOIA) or Privacy Act (PA) Requests vs. ESI Requests

- ESI requests must be differentiated from requests pursuant to the Freedom of Information Act (FOIA) and Privacy Act (PA), but, at times, may follow similar procedures. The servicing legal office should be the first line of defense in determining whether the request requires processing under FOIA.
- Generally, requests for ESI are those which are not of a personal nature and have an inherent military mission or function for its use. For example, requesting e-mails pursuant to a commander directed investigation would be an ESI request. Also, requesting e-mails of a recently deceased member to continue a military duty is an ESI request. A request by an individual not selected for an advertised position for all e-mails between two other individuals concerning the selection decision would need to be made as a FOIA or PA request through proper FOIA and/or PA channels.
- As part of the FOIA and PA process, FOIA and PA Managers will make the request for the release of ESI using the ESI process. ESI identified is released back to the FOIA and/or PA managers for continued processing.
 - Approval of the request to retrieve e-mails or data for FOIA and/or PA requests does not constitute a FOIA and/or PA approval or disapproval. Only FOIA and PA managers and the servicing legal office will ascertain whether information contained in the e-mails should be released to the third party.

ESI Request Format

- A request for ESI must contain key information for System Administrators, exchange administrators, and judge advocates to process the request. The ESI request format directed by AFCYBER follows. The ESI request should be sent to the 616 OC Senior Duty Officer (SDO) at 616oc.sdo@us.af.mil. Investigating Officers should include a copy of their appointment letter.

Suggested Format for Electronically Stored Information (ESI) E-Mail Message

MEMORANDUM FOR 616 OC/CC

FROM: (Requestor)

SUBJECT: Request for Access to Electronically Stored Information

1. *Description of basis for the request*
2. Request access to ESI on the Air Force Information Network (AFIN), as described below, to support the listed investigation (ensure that the following information is included, preferably using this format):
 - a. Requestor: Name, Rank, unit
 - b. Requestor Duty Address
 - c. Requestor E-mail address
 - d. Requestor Duty Phone (Commercial & DSN)
 - e. Requestor's After Duty Hours Phone
 - f. Classification of the information
 - g. Date Range of Investigation
Include a specific start date AND end date (i.e.: From 19 Jan 2016 to 19 Jan 2017)
"Present" cannot be used as an end date
 - h. Expected location of data – list all affected base locations
 - i. Subject's Information
Include **ALL** of the following for each subject:
 - Subject's Full Name
 - Subject's Electronic Data Interchange Personal Identifier (EDI-PI) Number. The EDIPI number is a subject's DOD Identification number. It is the unique 10-digit number assigned to each person who has a record in the Defense Eligibility and Enrollment Record System (DEERS) and is commonly found on the back of an individual's Common Access Card (CAC).
 - Subject's e-mail addressRequests cannot be processed without all three types of information
 - j. What Type of Data is Requested
Select needed data type(s) from list:
 - E-mail/Lync Messages
 - Web Logs – record of website(s) subject connected to
 - Network Connection Logs (Local Base) – record of when subject connected to local network
 - User Profiles (Local Base) – subject's files on each computer they logged onto at the base
 - User Network Shares (Local Base)Local Base information includes, but is not limited to, data on personal shared drives, organizational Sharepoint sites, Personal Storage Table (PST) files, organizational/personal databases, letters, reports, forms, messages, instant messages/chat sessions, word processing documents, spreadsheets, personal and shared calendars, correspondence, images, drawings, photographs, sound recordings, websites, blogs, wikis, notes, journals, diaries, slide presentations, and Microsoft Outlook task list

- k. Whether the requested email and/or data is believed to contain communications involving a lawyer, clergy, health care provider, or information protected by the Health Insurance Portability and Accountability Act (HIPAA)
- l. Whether the requested email and/or data is expected to contain proprietary information relating to government contracts, or contractor-related protected information
- m. Preferred method of receiving the requested information. Delivery methods include Upload data to DoD Safe Access File Exchange (SAFE) or burn data onto a disc and mail it to requestor.

//REQUESTOR'S ELECTRONIC SIGNATURE BLOCK//

[Administrative Note: Requestor must sign and encrypt the ESI request e-mail]

1st Ind, 616 OC/CC MEMORANDUM FOR RECORD

I approve/disapprove

616 OC/CC Signature Block

ESI Request Reviews

- An ESI request legal review, conducted by 16 AF/JA, generally will:
 - Analyze the proper authority of the requesting individual (valid basis to request information)
 - Ensure legitimacy of request (not overly broad, for official purpose, etc.)
 - Ensure sufficiently detailed description of data requested in light of the basis
 - Advise on whether the requested data may be released and any remarks regarding the data being released
- E-mail requests typically provide **ALL** e-mails for the period requested. These will require the requestor to perform a content review prior to certain uses of the data. The requestor is responsible for ensuring proper uses of all retrieved data and should seek legal advice from the servicing legal office as appropriate.
 - Specifically, the requestor's local Staff Judge Advocate (SJA)'s office should be contacted for support for requests likely to contain proprietary information of DoD contractors, or privileged communications between the individual and clergy, health care practitioners, or attorneys

Computer Misuse

- Seemingly, small incidents of computer misconduct may have large impacts for the AFIN. For example, installing unauthorized software on a single computer may expose the entire network to malware infection and disruption.
- AFMAN 17-1301, *Computer Security (COMPUSEC)* includes user responsibilities on the AFIN. Often, violations of these standards are reported to commanders by System Administrators.
- When a commander becomes aware of computer misuse, they should consider disciplinary action when appropriate. Most computer misuse is punishable under the UCMJ. Consult your servicing legal office for more information.
- Common inappropriate uses include: (1) unauthorized personal use including use for personal gain; (2) uses that would adversely reflect on the DoD or the Department of the Air Force; (3) storing, processing, displaying, sending, or otherwise transmitting prohibited content (i.e., pornography, sexually explicit or sexually oriented material); and (4) knowingly downloading or installing unauthorized software

Personally Identifiable Information (PII)

- Breaches involving Personally Identifiable Information (PII) are a high-level interest issue. PII breaches create personal vulnerabilities for individuals, but can also create AFIN vulnerabilities.
- The term PII refers to "information that can be used to distinguish or trace an individual's identity either alone or when combined with other information that is linked or linkable to a specific individual. PII may range from common data elements such as names, addresses, dates of birth, and places of employment, to identity documents, Social Security numbers (SSN) or other government-issued identity, precise location information, medical history, and biometrics. Because there are many different types of information that can be used to distinguish or trace an individual's identity the term PII is necessarily broad."
- E-mails containing PII (e.g., alpha rosters, recall rosters, investigative reports, etc.) must be digitally signed and encrypted and attachments containing PII must be password protected (see AFI 33-332, *Air Force Privacy and Civil Liberties Program*, paragraph 7.1.4)
- Misuse of the AFIN or failure to follow directives such as those requiring encryption of PII may result in a suspension of access to the AFIN

REFERENCES

- Freedom of Information Act, 5 U.S.C. § 552
- Privacy Act, 5 U.S.C. § 552a
- Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030
- The Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510 *et seq.*
- The Wiretap Act, 18 U.S.C. §§ 2510-2520
- The Stored Communications Act, 18 U.S.C. §§ 2701-2712
- Pen Register and Trap and Trace Act, 18 U.S.C. §§ 3121-3127
- Bohach v. City of Reno*, 932 F.Supp. 1232 (D.Nev.1996)
- Joint Publication (JP) 3-12, *Cyberspace Operations* (8 June 2018)
- DoDD 3115.18, *DoD Access to and Use of Publically Available Information (PAI)* (11 June 2019), incorporating Change 1, 20 August 2020
- AFI 17-101, *Risk Management Framework (RMF) for Air Force Information Technology (IT)* (6 February 2020)
- AFI 17-130, *Cybersecurity Program Management* (13 February 2020)
- AFI 33-322, *Records Management and Information Governance Program* (23 March 2020)
- AFI 33-332, *Air Force Privacy and Civil Liberties Program* (10 March 2020), with corrective actions, 12 May 2020
- AFI 51-201, *Administration of Military Justice* (18 January 2019), including DAFI 51-201_ DAFGM2021-01, 5 January 2021
- AFI 51-301, *Civil Litigation* (2 October 2018)
- AFMAN 17-1301, *Computer Security (COMPUSEC)* (12 February 2020)
- Office of Management and Budget Memorandum M-17-12, *Preparing for and Responding to a Breach of Personally Identifiable Information* (3 January 2017)

LEGAL ISSUES IN CYBERSPACE OPERATIONS

Terminology

- Cyberspace terminology used for cyberspace operations often change and are not always used consistently. Even across U.S. Government agencies, there are variations in the cyber lexicon. For example, current Department of Defense (DoD) doctrinal terminology does not align with current U.S. national policy terminology, and terms from either or both may appear in orders or other authorities. Terminology may also not be consistent with traditional uses (e.g., the doctrinal definition of “cyberspace attack” is inconsistent with the definition of an attack under the law of war). Consultation and verification of source documents is recommended when drafting documents related to cyberspace operations.

Mission Sets

- There are three basic mission sets for cyberspace operations:
 - DoD Information Network (DODIN) Operations: Operations to design, build, configure, secure, operate, maintain, and sustain DoD networks to create and preserve information assurance on the DoD information networks. DODIN Operations include the cyberspace security action.
 - Does NOT include actions taken under statutory authority of a service Chief Information Officer (CIO) to provision cyberspace for operations, including IT architecture development, establishing standards, or designing, building, or otherwise operationalizing DODIN information technology for use by a commander
 - AFCYBER, the Air Force service component to U.S. Cyber Command (USCYBERCOM), has standing authority to conduct DODIN Operations on the Air Force Information Network (AFIN)
 - Using the Directive Authority to Conduct Cyberspace Operations (DACO), AFCYBER may order any Department of the Air Force unit to conduct specific DODIN Operations missions on the AFIN
 - Defensive Cyberspace Operations (DCO): Missions executed to defend the DODIN, or other cyberspace that DoD cyberspace forces have been ordered to defend, from active threats in cyberspace. These missions are intended to preserve the ability to utilize blue cyberspace capabilities and protect data, networks, cyberspace-enabled devices, and other designated systems by defeating on-going or imminent malicious cyberspace activity. DCO has three components:
 - DCO-Internal Defense Measures (DCO-IDM): Operations in which authorized defense actions occur within the defended portion of cyberspace (blue cyberspace)
 - DCO-IDM includes cyberspace defense actions
 - AFCYBER has standing authority to conduct DCO-IDM on the AFIN, and may be tasked by USCYBERCOM to conduct DCO-IDM on other DoD networks
 - Using DACO, AFCYBER may order any Air Force unit to conduct specific DCO-IDM missions on the AFIN
 - DCO-Response Actions (DCO-RA): Operations that are part of a defensive cyberspace operations mission that are taken external to the defended network or portion of cyberspace without the permission of the owner of the affected system
 - DCO-RA missions include cyberspace exploitation and/or cyberspace attack actions

- DCO-RA missions require authority flowing from the Secretary of Defense (SecDef) via military order, and consideration of the law of war and rules of engagement (ROE)
- Defense of Non-DoD Cyberspace: When required under a specific authorizing order, and in full coordination with the Department of Homeland Security (DHS) and other U.S. Government (USG) departments and agencies, DoD cyberspace forces undertake DCO-RA and DCO-IDM missions to defend non-DoD cyberspace segments, like other USG networks, national critical infrastructure networks, defense industrial base networks, or mission partner networks
 - DCO-IDM missions defending non-DoD cyberspace may be ordered as part of Defense Support to Civil Authorities (DSCA) operations. These operations generally require consent of the network owner. This is called Defense Support to Cyber Incident Response (DSCIR), and is governed by DODD 3025.18, *Defense Support of Civil Authorities*, and DTM 17007, *Interim Policy and Guidance for Defense Support to Cyber Incident Response*.
 - DCO-RA missions defending non-DoD cyberspace require authority flowing from SecDef via military order, and consideration of the law of war and rules of engagement (ROE)
- Offensive Cyberspace Operations (OCO): Missions intended to project power in and through cyberspace. OCO may exclusively target adversary cyberspace functions or create first-order effects in cyberspace to initiate carefully controlled cascading effects into the physical domains to affect weapon systems, command and control (C2) processes, logistics nodes, high-value targets, etc. All cyberspace operations missions conducted outside of blue cyberspace with a commander's intent, other than to defend blue cyberspace from an ongoing or imminent cyberspace threat, are OCO missions.
 - OCO missions include cyberspace exploitation and/or cyberspace attack actions
 - OCO missions require authority flowing from SecDef via military order, and consideration of the law of war and rules of engagement (ROE)

Cyberspace Actions

- Execution of any OCO, DCO, or DODIN Operations mission requires completion of specific tactical-level actions or tasks that employ cyberspace capabilities to create effects in cyberspace. To plan for, authorize, and assess these actions, it is important that the commander and staff clearly understand which actions have been authorized under their current mission order. The cyberspace actions defined in JP 3-12, *Cyberspace Operations*, are:
 - Cyberspace Security: Actions taken within protected cyberspace to prevent unauthorized access to, exploitation of, or damage to computers, electronic communications systems, and other information technology, including platform information technology, as well as the information contained therein, to ensure its availability, integrity, authentication, confidentiality, and nonrepudiation.
 - Cyberspace Defense: Actions taken within protected cyberspace to defeat specific threats that have breached or are threatening to breach cyberspace security measures and include actions to detect, characterize, counter, and mitigate threats, including malware or the unauthorized activities of users, and to restore the system to a secure configuration
 - Cyberspace Exploitation: Actions taken in cyberspace to gain intelligence, maneuver, collect information, or perform other enabling actions required to prepare for future military operations

- Cyberspace Attack: Actions taken in cyberspace that create noticeable denial effects (i.e., degradation, disruption, or destruction) in cyberspace or manipulation that leads to denial that appears in a physical domain, and is considered a form of fires

“Title 10” vs. “Title 50”

- “Title 10” and “Title 50” are often used as shorthand for “military operations” and “intelligence activities,” respectively. Usually, the speaker refers to DoD activity (“Title 10”) or Intelligence Community activity (“Title 50”). Although such terminology is widespread, it is generally incomplete, inaccurate, and confusing.
 - Title 10: The heading of Title 10, United States Code, is “Armed Forces.” It is the primary authority for the manning, training, and equipping of the armed forces by each military service.
 - Title 50: The heading of Title 50 is “War and Defense.” It provides the authority for operating the intelligence community, providing a breakdown of responsibilities for Departments and Agencies with intelligence community elements, including major agencies within the DoD.
- The DoD is authorized to conduct both Title 10 and Title 50 operations. Proper legal and operational analysis begins with identifying the purpose of the activity, the entity that is conducting the activity, and how the information gathered during the activity is to be used.

Covert Action versus Traditional Military Activity

- Covert Action: As defined in the Covert Action Statute, 50 U.S.C. § 3093, “covert actions” are “... activities of the U.S. Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States will not be apparent or acknowledged publicly”
 - Covert actions must be approved by the President and have significant congressional oversight
 - The military is generally not permitted to conduct covert activities
- Traditional Military Activities (TMA): Expressly deemed not covert actions, even when conducted clandestinely. At a minimum, to qualify as a TMA, the activities must be under the direction and control of a military commander.
 - Clandestine Military Cyberspace Operations: Under the *Authorities Concerning Military Cyber Operations*, 10 U.S.C. § 394, clandestine military activities or operations in cyberspace are considered to be TMAs
- Regardless of the underlying authority, many cyberspace operations are conducted at higher classification levels, so it is imperative that any legal advisor receive the pertinent classification and read-in(s) prior to providing legal advice

Domestic Law

- With respect to the application of domestic law, there is no substantive difference between whether an activity is classified as “Title 10” or “Title 50.” Activities conducted under both titles must comply with the U.S. Constitution and with U.S. law.
- Domestic laws place considerable restraints on cyberspace operations, particularly within the United States, but also in foreign countries
- Legal analysis is key to determining whether and how domestic laws impact military operations

Policy

- National Security Presidential Memorandum 13 (NSPM-13), U.S. Cyber Operations Policy: All DoD offensive cyber operations must comply with NSPM-13, as amended. The document itself is classified.
- DoD Policy applicable to cyberspace operations is contained in 8000-series DoD instructions, directives, and manuals, mostly promulgated by the DoD Chief Information Officer (CIO). Unclassified policy is available at the DoD Issuances website located at <https://www.esd.whs.mil/DD/>. Classified policy is available on SIPRNet and the Joint Worldwide Intelligence Communications System (JWICS).
- The Chairman of Joint Chiefs of Staff (CJCS) policies applicable to cyberspace operations is contained in 6000-series instructions, manuals, and other directives. Unclassified policy is available at the Joint Chiefs of Staff Library Website located at <https://www.jcs.mil/Library/>. Classified policy is available on SIPRNet and JWICS.
- Air Force Policy applicable to cyberspace operations is contained in 17-series AFPDs, AFIs, and AFMANs, available at Department of the Air Force E-Publishing website located at <https://www.e-publishing.af.mil/>. Classified policy is available on SIPRNet and JWICS.
- Department of the Air Force Policy Regarding Cyber Capabilities:
 - Section 16.6 of DoD Law of War Manual states that “DoD policy requires the legal review of the acquisition of weapons or weapons systems. This policy would include the review of weapons that employ cyber capabilities to ensure that they are not per se prohibited by the law of war. Not all cyber capabilities, however, constitute a weapon or weapons system.” The manual provides that military department regulations address what cyber capabilities require legal review.
 - Department of the Air Force policy currently requires that cyber capabilities “being developed, bought, built, modified (more than minor modification) or otherwise acquired by the Air Force that are not within a special access program [be] reviewed for legality under the law of war, domestic law and international law.” (AFI 51-401, *The Law of War*, paragraph 2.1.2.2)
 - Note that this requirement applies to all cyber capabilities, not just to weapons. However, this requirement is directed for Department of the Air Force cyber capabilities, and it is not automatically extended to joint operations and capabilities.
 - The legal review must be coordinated and staffed by the MAJCOM or Field Operating Agency (FOA) developing/acquiring the capability
 - The legal review is required to address the following:
 - Whether there is a specific rule of law prohibiting or restricting the use of the weapon or cyber capability, whether by domestic law, a treaty obligation of the United States, or law accepted by the United States as customary international law
 - If there is no express prohibition, the following issues are analyzed:
 - Whether the weapon or cyber capability is calculated to cause unnecessary suffering or unnecessary injury
 - Whether the weapon or cyber capability is capable of being directed against a specific military objective and, if not, is of a nature to cause damage, or a significant adverse effect, on military objectives and civilians or civilian objects without distinction

- The fact that another service or the forces of another country have adopted the weapon or cyber capability may be considered in determining the legality of such a weapon or cyber capability, but such fact shall not be binding

International Law and Law of War Considerations

- Jus ad bellum:

- The United States has generally treated the terms “use of force” and “armed attack” from the UN Charter synonymously. The issue of whether OCO rises to the level of an armed attack is an important one for ensuring the United States complies with the UN Charter and because of the potential application of the nation’s inherent right of self-defense.
- Currently, there is no official international consensus regarding what constitutes a use of force or armed attack in cyberspace
 - However, there is also a growing body of state practice supporting the position that disruptive actions resulting in annoyance or harassment, even if for an extended period of time against many websites, do not amount to an armed attack
 - There is also a growing consensus among academics and policymakers that cyber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force/armed attack
- If OCO rises to the level of an “armed attack,” then the state where the action occurs would be justified under Article 51 of the UN Charter to use force in response

- Military Necessity:

- It is unlawful for a party to a conflict to “destroy or seize the enemy’s property unless such destruction or seizure is imperatively demanded by the necessities of war” (Hague IV, Annex, art. 23(g)). Lawful military objectives (targets) are those objects “which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definitive military advantage (Additional Protocol I, art. 52(2)).
- Just as for kinetic targets, a legal review will address employment of cyberspace capabilities in both a targeting review (whether it is a valid target) and an operational legal review (whether the method to prosecute that target advance a legitimate military objective)

- Unnecessary Suffering:

- The use of arms which are calculated to cause unnecessary suffering is prohibited. Generally, cyber capabilities will not cause such effects, but if such effects are likely, they will be addressed in the operational legal review.

- Proportionality:

- Just as with physical operations, cyber operations must take into account potential collateral damage caused to the civilian population, and it must not be excessive in relation to the military advantage anticipated
 - For example, a cyber operation to disrupt a nation’s air traffic control feed in order to take out a valid military target aboard an aircraft may run afoul of the proportionality requirement
- The commander must assess whether the damage to civilians and civilian property is excessive in relation to the military advantage anticipated by the cyber operation

- Distinction:

- Sometimes referred to as discrimination, distinction requires parties to a conflict to distinguish between combatants and the civilian population and property
- Due to the overlapping nature of military and civilian uses of cyberspace, distinction can play a very important role in cyber operations. Depending on the language of the code, cyber capabilities can be developed with specific or generic targets.
 - For example, a cyber capability designed to only create effects on certain industrial control systems known to be used in an adversary's nuclear enrichment facility would likely be considered a discriminate weapon. In contrast, a virus (e.g., the Conficker worm in the early 2000s) designed to replicate and spread to any system it touches on the Internet would raise distinction concerns because it does not distinguish between civilian and military systems.
- Dual-use systems provide service and capabilities to the civilian population and are also used for military purposes
 - Terrorists, enemy combatants, and even nation-states will use civilian networks and cyber infrastructure for their operations, so any operation targeting these capabilities will, by definition, target civilian infrastructure
 - These dual-use systems are lawful military targets if they make an effective contribution to the enemy. This unique aspect of cyberspace targeting will be addressed in both the targeting and operational legal reviews. As noted in the DoD Law of War Manual, dual-use is a term sometimes used to describe objects that are used by both the armed forces and the civilian population, however, from a legal perspective, such objects are either military objectives or they are not.

- Honor:

- The principle of honor (or chivalry) permits lawful ruses such as camouflage, false signals, and mock troop movements but forbids perfidious acts
- Because the infrastructure allowing for the delivery of cyber effects crosses multiple countries and cyber effects can be created by non-state actors (e.g., independent hackers), attributing a cyber effect to a particular source can be challenging
 - An additional issue is that, unlike physical attacks, the ability to mislead an adversary as to the source of cyber operations is much greater
- Disguising cyber effects as normal web traffic or concealing the source of such operations is similar to a permissible lawful ruse and does not violate the principle of honor
- The Tallinn Manual on the International Law Applicable to Cyber Warfare: The manual, published in 2013, contains 95 rules related to both the *jus ad bellum* and *jus in bello* aspects of cyber warfare. The manual is **not** binding international law, but rather represents opinions of how the law of armed conflict applies to actions in cyberspace.
- The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations: The manual, published in 2017, expands on the scope of and replaces the original Tallinn Manual. Where the original manual focused on cyber operations that constitute a use of force and trigger the right of self-defense, Tallinn 2.0 also examines more common cyber operations and incidents at the sub-use of force threshold. It is also important to note, the manual is **not** binding international law, but rather represents opinions of how the law of armed conflict applies to actions in cyberspace.

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SPACE LAW OVERVIEW

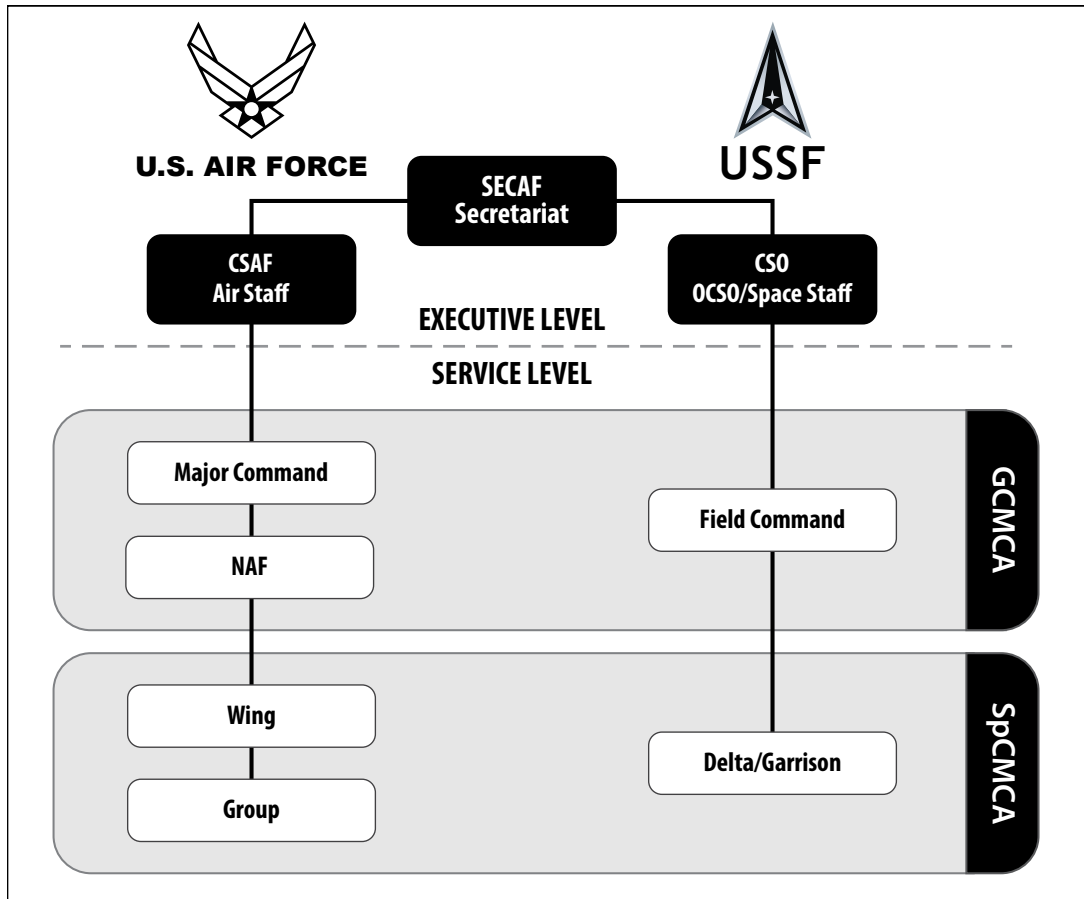
With the establishment of the United States Space Force (USSF) as the sixth armed force of the United States and the reestablishment of United States Space Command (USSPACECOM) as an independent combatant command (CCMD), space is now recognized by the U.S. and the Department of Defense (DoD) as its own warfighting domain, independent yet well integrated with and supportive of the other warfighting domains. Space is vital to our national security and the U.S. is becoming increasingly dependent on space-based systems and technologies to support military operations and our way of life in the United States and around the world. The challenge we face is that our competitors in space are developing capabilities that threaten our space interests, requiring the U.S. to prepare defensive measures in the feasible event that we are threatened or attacked in space. As we take defensive measures, it is imperative to consider the existing law and policy applicable to space. It is therefore important for commanders to be acquainted with space law and policy, and to remain actively engaged with their judge advocates while planning and implementing space missions and operations.

The New Space Organization

- The USSF is established as a new service in law under 10 U.S.C. § 9081. With its establishment, there are now two services within the Department of the Air Force (DAF): The U.S. Air Force (USAF) and the USSF. As a service, the USSF is responsible for organizing, training, and equipping space forces, and presenting space forces and space capabilities to the CCMDs. In accordance with the Goldwater Nichols Act, the USSF as a service is not authorized to conduct space operations. As a geographic CCMD, USSPACECOM is given distinct authorities, which allow it to conduct space operations, when directed, within its area of responsibility (AOR), which begins 100 kilometers above mean sea level.
- The infrastructure and support functions at USSF installations are provided by USAF personnel under the command and control of the USSF installation commander. USAF lawyers, doctors, civil engineers, chaplains, etc. are assigned to USSF commands to provide functional support to USSF units and missions. Commissioned officers of the Air Force and Space Force can command organizations and personnel in either Service.
- Relative to the USAF, the USSF has two fewer echelons of command in its organizational chain in an effort to remain a lean and agile service. There are servicing legal offices at each echelon of command, similar to the USAF, and judge advocates are assigned to USSF legal offices. The USSF echelons of command are described below:
 - *Field Command*: A major subdivision of the USSF that is directly subordinate to the Chief of Space Operations (CSO) at the headquarters. The field command is the USSF equivalent to the MAJCOM and NAF and has general court-martial convening authority (GCMCA) over its subordinate deltas and squadrons, consisting of both Airmen and Guardians.
 - *Delta*: The level of command between field commands and squadrons. Deltas are the USSF equivalent of the USAF wing and group. The Commander of a delta has special court-martial convening authority (SPCMCA) over its subordinate units. **Note:** During the USSF establishment phase, installation deltas will be referred to as garrisons.
 - *Squadrons*: The basic building block organization of the USSF, similar to the USAF, providing a specific mission or support capability. Squadrons generally report directly to the deltas.

- The USSF reporting chain and echelons of command are depicted and compared to the USAF in the organizational chart below.

Figure 19.1 Side-by-side comparison of the USAF and USSF reporting chains



International Law Applicable to Military Space Operations

- The main principles applicable to the use and exploration of outer space stem from four United Nations (UN) space treaties, to which the US is a party. These include: (1) The Outer Space Treaty (1967), (2) the Rescue and Return Agreement (1968), (3) The Liability Convention (1972), and (4) the Registration Convention (1976). There is a fifth UN Space Treaty, the Moon Agreement, which neither the US nor any of the major space-faring nations are party to.
- With some exceptions, this international body of law provides the DoD wide-ranging freedom and flexibility in the conduct of space activities — from force enhancement to force application. Most of the regulatory framework applicable to military space operations does not stem from the UN space treaties. Rather, it stems from other bodies of international law, such as the UN Charter and the law of war, as well as national law and policy.

Where Does Airspace End and Outer Space Begin

- There is no defined boundary between airspace and outer space under international law. This is significant because a nation's sovereignty over its airspace does not extend into outer space and different laws apply in outer space. While States generally accept that there is a limit to the sovereign airspace above their territory, the international community has been unable to reach a common consensus over where this boundary is. The most widely recognized boundary is the Karman line, which is at an altitude of approximately 100 kilometers above sea level.
 - Historically, the U.S. has taken the view that defining such a boundary under international law is unnecessary, in part because it could limit freedom of action and the ability to exploit new technologies such as hypersonic flight capabilities. As a result, outer space is defined broadly in DoD publications as the "area above the altitude where atmospheric effects on airborne objects becomes negligible." (JP 3-14) **Note:** The establishment of USSPACECOM's AOR as beginning at 100 kilometers above mean sea level (MSL) is not intended to define outer space under U.S. law; rather, it is intended to define an operational area of responsibility. However, the extent to which this delimitation may impact areas of state practice or the development of customary international law remains to be seen.

The Outer Space Treaty and other UN Space Treaties:

- The Outer Space Treaty (OST) (1967) is the foundational space law treaty and contains broad principles regarding the use and exploration of outer space. All of the major space-faring nations, as well as many of the non-space-faring nations, are party to this treaty. Although the treaty is over 50 years old and space operations have changed dramatically since the Cold War era, the key principles of the OST are still relevant today. Some of the principles are considered customary international law, meaning they are binding on non-party States to the treaty.
- Space is becoming increasingly contested and congested, and new technology is changing the way States and commercial entities use and explore space. All of the principles in the OST impact military space activities during times of peace. However, it remains to be seen how many of these broad principles will apply in the event that armed conflict extends into space. The key principles of the OST and the three other UN treaties are described below.

Use of Space for Peaceful Purposes

- The preamble of the OST recognizes that it is in the common interest of mankind to use and explore space for peaceful purposes. Notably, nothing in the binding provisions of the OST declares that outer space generally must be used for peaceful purposes; rather, it only requires that the moon and other celestial bodies be used *exclusively* for peaceful purposes and prohibits military bases, weapons testing of any kind, and military maneuvers on the moon and other celestial bodies.
- The OST does not define what the term "peaceful purposes" means. The majority view, influenced by the U.S., is that peaceful purposes equates to non-aggressive exploration and use of outer space. Therefore, military activities such as intelligence collection, missile early-warning, and the transmission of military communications and navigation signals to, from, and through space all constitute non-aggressive, peaceful purposes. Even though there is no overarching requirement that outer space generally be used for peaceful purposes, most countries, including the U.S., recognize this principle as a matter of national policy.
 - In light of the peaceful purposes principle, it is important to carefully consider language used in reference to space activities and operations to determine whether it may be perceived as unduly aggressive by our international allies, partners, and competitors, as this could impact international relations

Militarization and Weaponization of Space

- There is an important distinction between the militarization of space and the weaponization of space. As mentioned above, nothing in the OST prevents the militarization of space, although there are significant limitations on the military use of the moon and other celestial bodies. Space has otherwise been militarized since the beginning of the space age and that development represents nothing new.
- The weaponization of space has become a threat to our national security and space interests, particularly the development of anti-satellite (ASAT) and space-based weapons by U.S. competitors. The OST does not contain a general prohibition on weapons in space, but there are a few specific prohibitions and arms control provisions. Nuclear weapons and other weapons of mass destruction are prohibited from being placed in orbit, on celestial bodies, or otherwise stationed in space. Further, as mentioned, no weapon testing of any kind may be conducted on the moon and other celestial bodies. Aside from this, there is no prohibition on other types of weapons such as kinetic (including ASATs), directed energy, and electronic warfare. There is also no express prohibition on launching intercontinental ballistic missiles (ICBMs) through space, because ICBMs are not placed in orbit or stationed in space.
 - Political sensitivities, rather than law, are responsible for the cautious approach of the U.S. and other countries towards ASATs and other space-based weapons
- Other arms control treaties may further limit the use or placement of weapons in space. For example, the Limited Test Ban Treaty (1963) prohibits nuclear weapons testing or any other nuclear explosion under water, in the air, and in outer space.

Freedom of Use and Non-Appropriation Principles

- The OST requires that space be free for the exploration and use by all States, and States should therefore make an effort to avoid interfering with the exploration and use of space by other States. In other words, unless authorized by international law, no State may prohibit another State from accessing space or any areas on celestial bodies. Unlike airspace, States also have the right to navigate over another State's territory in space because of this legal principle known as the Freedom Principle. However, the right of space objects to pass through foreign airspace during launch or recovery generally requires pre-authorization.
- If military space activities may cause harmful interference with the space activities of other States, international consultations are required by the OST before proceeding. In practice, consultations have rarely, if ever, occurred.
- Outer space, including the moon and other celestial bodies, cannot be owned or appropriated by a State or other entity. One debated issue is whether this provision allows for the appropriation of extracted resources in space, such as from the moon. This issue has become more prominent with the increasing number of commercial actors in space. U.S. law specifically permits the exploitation of resources in outer space, including by commercial entities.
 - Due to the free exploration and non-appropriation provisions in the OST, caution should be exercised before acting or publicly expressing the intent to act in a manner that could interfere with the space activities of other States. Consultation with the servicing judge advocate (SJA) is recommended in these situations.

International Law Applies to Space Activities

- General international law is applicable in space under the OST, and should therefore be considered when planning military space operations. This includes general principles of customary international law (e.g., the inherent right to self-defense), the UN Charter's prohibition against the threat and use of force, and other international agreements. In addition, the applicable law of war principles must be considered during operational planning and targeting processes.

While it is clear the law of war applies to military space operations, the practical application of the law can be challenging, given the lack of historical state practice in this area and the unique characteristics of the physical space environment.

States are Responsible and Liable for the Space Activities of State and Non-State Actors

- A unique aspect of the space domain is that States bear international responsibility and liability for the space activities of both State and non-State actors. For example, if a commercial entity launches an object into space from U.S. territory, the U.S. will be internationally responsible for any wrongful act(s) committed by the private entity. The Registration Convention provides one means of determining which State is responsible for a particular space object, by requiring States to establish a national registry to record every object the State launches into space, including military objects. Whenever an object is launched from the territory of a State or a State helps to procure a launch, that State will be internationally liable for any damage the launched object causes on the Earth's surface or in orbit. As a result, States must authorize and continually supervise all space activities by State and non-State actors, which is usually accomplished through a national licensing process.
- Two UN space treaties expand upon these OST principles and are further explained below:
 - *Liability Convention (1972)*: This convention elaborates upon the OST regarding the liability of launching States for any damage on Earth or in orbit caused by launched space objects. Launching States are absolutely liable for damage caused by space objects on the surface of the Earth or to aircraft in flight. For damage caused to objects in space, launching States are liable only if they are at fault. The convention describes the circumstances under which States may be held liable for such damage, and sets out procedures to follow in pursuing a claim for damages. The convention is likely inapplicable between Parties engaged in an armed conflict.
 - *Registration Convention (1976)*: This convention expands upon the OST and assists States in identifying responsibility over space objects. It requires a launching State to maintain a registry of objects launched into space and provide certain data to the UN as soon as practicable for every object launched, including military objects. The UN publishes the data in a register available to the public via the Internet at <http://www.unoosa.org/oosa/en/SORegister/index.html>.

Astronauts are the Envoys of Mankind

- The OST provides that astronauts shall be regarded as “envoys of mankind in outer space” and requires State Parties to render them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State or on the high seas. The Rescue and Return Agreement (1968) expands upon this principle. Given that astronauts are often military personnel, it remains unclear whether military personnel would be protected by this agreement and the OST during an armed conflict. Applicability may depend on the mission and the circumstances. The agreement also provides for the retrieval of space objects found outside the territory of a launching State and the return to the launching State, upon request.

Satellite Communications and the Role of the ITU

- The International Telecommunications Union (ITU) is a UN specialized agency, which may impact space activities and operations, particularly those involving satellite communications. It provides the international framework for the management of international telecommunications and administers relevant international treaties, including the ITU Constitution, the ITU Convention, and the Radio Regulations. The U.S. is a member of the ITU and is therefore bound by the provisions of these three governing instruments, which declare the radio-frequency spectrum and

the geostationary orbit are limited natural resources to which all States are authorized equitable access. The overarching goal of the ITU is to prevent harmful radio-frequency interference through the development of international standards and the de-confliction of radio-frequencies.

- The ITU allocates satellite orbits and bands of radio-frequency spectrum to different categories of services, allots radio frequencies to countries or regions, and registers radio-frequency assignments at the international level. For the geostationary orbit, the ITU also allocates physical slots, and satellites must remain within + or – 0.1 degrees of an allocated physical slot. The geostationary orbit is a circular orbit above the equator, which has an orbital period equal to that of the earth. A satellite stationed in this orbit therefore appears stationary above the earth, making the orbit ideal for satellite communication purposes.
 - The assignment of radio-frequencies to satellite operators occurs at the State level. For example, in the US the Federal Communications Commission (FCC) assigns radio-frequencies to commercial satellite operators and the National Telecommunications and Information Administration (NTIA) assigns radio-frequencies to federal government operators. Once satellite operators are assigned frequencies, they are entitled to operate without harmful interference.
- The ITU procedures and rules generally do not apply to military activities with some exceptions. For example, military satellite operators cannot ignore the laws of physics and therefore must give due regard to the rights of other spectrum users in order to avoid causing harmful interference so far as possible. It is important to consult a judge advocate in any situation where military operations may interfere with the rights of other spectrum users.

Orbital Debris Mitigation

- Space is becoming more and more crowded, with an increasing number of actors and objects. As a result, the number of defunct satellites and other man-made objects orbiting around the Earth is continuously on the rise, increasing the odds of space collisions, which can have devastating consequences. Despite this challenge, international law does not prohibit or otherwise specifically address the creation of space debris, nor does it require that objects be de-orbited or transferred to a graveyard orbit towards the end of their useful life. For this reason, the U.S., the UN, and other space-faring nations have developed voluntary guidelines to limit the creation of new debris and the U.S. has led the way in developing national standards to minimize space debris, which will be discussed below.

U.S. Law and Policy Applicable to Military Space Operations

- Given the permissive nature of international space law for military operations, U.S. military activities and operations in space are largely regulated by national and DoD policy. Military space operations are also guided by joint doctrine, such as Joint Doctrine (JP) 3-14, Space Operations. As a matter of national policy, the U.S. acknowledges that the use of space is for peaceful purposes, in accordance with international law, while also preparing for the reality that space must be defended from those who seek to undermine our interests in space.
- The establishment of the USSF and the reestablishment of USSPACECOM do not mark a change in the U.S. regulatory framework in space. Rather, the 2020 National Space Policy, the 2020 Defense Space Strategy, and the 2020 USSF Space Capstone Publication reaffirm the U.S. intent to continue to abide by applicable international agreements to which the U.S. is a party, to uphold and promote internationally accepted standards of responsible behavior in space, and to preserve and protect space for peaceful use and exploration.
- There are several national laws and policies that may impact or shape how the DoD conducts space activities and operations.

- U.S. law addresses interference with space activities. 18 U.S.C. § 1367 makes it a felony to intentionally or maliciously interfere with satellite operations or transmissions. While 18 U.S.C. § 1367 specifically exempts authorized law enforcement and intelligence activities, it does not specifically exempt other military and national security activities. The law does not apply extraterritorially and there may arguably be an implied national security exception for defense activities, provided there is a high level of approval for such activities. Given these sensitivities, consultation with a judge advocate is essential whenever the provisions of 18 U.S.C. § 1367 may be implicated by military space activities and operations.
- Space Situational Awareness (SSA) is the requisite foundational, current, and predictive knowledge and characterization of space objects and the space environment, upon which space operations rely. In addition to informing military space operations, SSA is essential to avoiding collisions in space and minimizing environmental damage and orbital debris. SSA is enabled by the U.S. Space Surveillance Network, which is a network of sensors and radars positioned around the world. As a result of SSA services and information, the U.S. has established one of the world's most robust and complete catalog of space objects.
 - Pursuant to 10 U.S.C. § 2274, the DoD is authorized to provide SSA services and information to, and obtain SSA data and information from, non-U.S. government entities, if determined to be consistent with national security. This law authorizes SSA sharing agreements with entities such as the governments of foreign States, political subdivisions of States, and U.S. and foreign commercial entities.
 - The U.S.-owned Global Positioning System (GPS) and space-based position, navigation, and timing (PNT) have become essential to both military and civil activities worldwide. In accordance with 10 U.S.C. § 2281 and 51 U.S.C § 50112, the DoD is responsible for sustaining and operating GPS for both military and civilian purposes and Congress encouraged the U.S. president in these acts to enter into international agreements to promote GPS as the international standard.
 - 10 U.S.C. § 2281 and the 2004 U.S. Policy on Space-Based Position, Navigation, and Timing (PNT) further asserts that the U.S. should provide uninterrupted access to GPS for U.S. and allied national security systems; provide access to GPS on a continuous, worldwide basis free of direct user fees for civil, commercial, scientific uses, and homeland security purposes; and improve capabilities to deny hostile use of any PNT services, without unduly disrupting civil and commercial access
- Although there is no requirement under international law to minimize orbital debris in space, the US government has enacted its own U.S. Orbital Debris Mitigation Standard Practices (ODMSP), which were updated and strengthened in 2019. These standards are intended to minimize new and mitigate existing space debris, and encourage the implementation of similar standards by other States. All civil and military launches in the U.S. must comply with these standard practices or seek an exception to policy.
- The U.S. meets its obligations under the OST and other UN space treaties, to authorize and continually supervise all space activities and objects, through its licensing process. Various U.S. agencies are involved in the licensing process depending on the function and operations of a satellite. These agencies include, but are not limited to, the Federal Aviation Administration (FAA) for commercial launches, the Federal Communications Commission for satellite communication links, and the Commerce Department's National Oceanic and Atmospheric Administration (NOAA) for remote sensing satellites.
- The U.S. Standing Rules of Engagement (SROE) contains a classified annex, Enclosure E, concerning space operations

- The binding international legal regime in space is unlikely to change in the near future due to a lack of international consensus amongst some of the space powers, which has driven efforts to develop non-binding standards instead. The 2020 U.S. National Space Policy directs the heads of US agencies, in collaboration with the Secretary of State, to: “[l]ead the enhancement of safety, stability, security, and long term sustainability in space by promoting a framework for responsible behavior in outer space ...” It also directs the Secretary of State, in coordination with the heads of agencies to “[c]ooperate with likeminded international partners to establish standards of safe and responsible behavior, including openness, transparency, and predictability, to facilitate the detection, identification, and attribution of actions in space that are inconsistent with the safety, stability, security, and long-term sustainability of space activities.”

Conclusion

- The establishment of a new service and independent combatant command dedicated exclusively to space in 2019 demonstrates the growing importance of the space domain to joint military operations and our national security. Space law and policy have existed for decades, but the application of the law to military operations in space has little historical practice and precedent. While it is unlikely that the international space legal regime will change anytime soon, the interpretation of how these legal principles apply in space will undoubtedly to be shaped by future state practice, especially as more and more actors develop space capabilities. In addition, the physical environment of space is unique and requires special considerations. Therefore, it is important to remain engaged with your judge advocate when planning and implementing space operations and missions, to ensure mission success in compliance with international and domestic law and policy.

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